(1)

No. 00-5961-CFH Title: Melvin Tyler, Petitioner
v.
Burl Cain, Warden

Docketed: August 30, 2000 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	Aug 30 2000	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due September 29, 2000)
	Sep 11 2000	Waiver of right of respondent Burl Cain, Warden to respond filed.
	Sep 14 2000	DISTRIBUTED for Conference of October 6, 2000
	Oct 2 2000	Response requested. (Due November 2, 2000)
	Nov 2 2000	Brief of respondent Burl Cain, Warden in opposition filed.
	Nov 6 2000	Reply brief of petitioner Melvin Tyler filed.
	Nov 16 2000	REDISTRIBUTED for Conference of December 1, 2000
	Dec 4 2000	REDISTRIBUTED for Conference of December 8, 2000
	Dec 11 2000	Petition GRANTED. SET FOR ARGUMENT April 16, 2001. **********
	Dec 27 2000	Record filed.
	Jan 9 2001	Record filed.
	Jan 22 2001	Brief of petitioner Melvin Tyler filed.
	Jan 22 2001	Joint appendix filed.
	Feb 14 2001	Order extending time to file brief of respondent on the merits until March 2, 2001.
	Feb 22 2001	CIRCULATED.
	Feb 26 2001	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Mar 2 2001	Brief amicus curiae of United States filed.
	Mar 2 2001	Brief of respondent Burl Cain, Warden filed.
	Mar 2 2001	Brief amici curiae of California, et al. filed.
	Mar 15 2001	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Mar 23 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DISTRIBUTED.
	Mar 26 2001	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Mar 30 2001	Reply brief of petitioner Melvin Tyler filed.
	Apr 16 2001	ARGUED.

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005961 (2)

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

Supreme Court, U.S.
FILED
AUG 30 2000
CLERK

MELVIN TYLER

Petitioner

versus

BURL CAIN, WARDEN

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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10/26 pd

QUESTIONS PRESENTED FOR REVIEW

I.

Whether a petition for a writ of habeas corpus asserting a claim of error under *Cage v. Louisiana*, 498 U.S. 39 (1990), relies on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," within the meaning of 28 U.S.C. § 2244(b)(2)(A) [the Anti-Terrorism and Effective Death Penalty Act].

II.

Whether the new rule of constitutional law announced by this Court in *Cage v. Louisiana*, 498 U.S. 39 (1990) should be made retroactively applicable to petitioners seeking collateral review of their convictions.

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

1. Melvin Tyler
2. Burl Cain, Warden
3. The State of Louisiana

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

MELVIN TYLER

Petitioner

versus

BURL CAIN, WARDEN

Respondent

Petitioner Melvin Tyler respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 1, 2000, to address the important question of federal law presented herein, and to resolve the conflict among the federal Courts of Appeals on this question.

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit which gives rise to this petition is *Tyler v. Cain*, #98-31159 (June 1, 2000), which is not reported. A copy of the opinion is attached to this petition as Appendix A. The "Memorandum and Order" of the United States District Court for the Eastern District of Louisiana denying Tyler's petition for post-conviction relief pursuant to 28 U.S.C. § 2254 is also unreported. This "Memorandum and Order" is attached to this petition as Appendix B.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

In April, 1997, petitioner Melvin Tyler, who is in the custody of the State of Louisiana, sought and received authorization from the United States Court of Appeals for the Fifth Circuit to file a successive petition for a writ of habeas corpus (28 U.S.C. § 2254) in the United States District Court for the Eastern District of Louisiana. However, the Court of Appeals limited the successive petition to the questions of whether this Court's decision in *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328 (1990) should be applied retroactively, and if so, whether the jury charge given at Tyler's trial was unconstitutional.[1]

In its order dated September 10, 1998, which is attached as Appendix B, the district court held that *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328 (1990) must be applied retroactively, because of the *en banc* opinion of the United States Court of Appeals for the Fifth Circuit in *Humphrey v. Cain*, 138 F.3d 552 (5th Cir., 1998)(Memorandum and Order, Appendix B, p.4).

However, the district court denied petitioner Tyler relief, even though the "reasonable doubt" portion of the jury charges given at his trial was indistinguishable from the one struck down by this Court in *Cage*. In the view of the district court, the Anti-terrorism and Effective Death Penalty Act (AEDPA), specifically 28 U.S.C. § 2254 (d)(1), changed the standard of review for state habeas petitioners, and under the "new" standard of review, a '*Cage*-type' instruction like the one given at Tyler's trial was in fact constitutional (Memorandum and Order, Appendix B., pp.8-10).

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[1] The jury charge Tyler complained of was almost identical to the one condemned by this Court in *Cage*. Like the instruction in *Cage*, Tyler's jury instruction contained the phrases: "*It must be such a doubt as would give rise to a grave uncertainty* raised in your minds by reasons of the unsatisfactory character of the evidence; one that would make you feel that you had not *an abiding conviction to a moral certainty of the defendant's guilt.* • • • *It should be an actual or substantial doubt.*"

In his appeal to the Court of Appeals for the Fifth Circuit, Tyler contended that AEDPA did not change the standard of review for state habeas petitioners. Even assuming that it did, however, Tyler argued that under the "new" standard of review, this Court's decisions in *Cage* and *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078 (1993) were still controlling, and that accordingly, the jury instructions given at his trial were unconstitutional. Tyler further contended that these decisions should be given retroactive effect on collateral review.

The Court of Appeals did not reach the substantive issues, but instead concluded that

> [t]he district court erred in not determining first whether Tyler's petition satisfied AEDPA's successive habeas standard, 28 U.S.C. § 2244(b)(2)(A). Procedurally, this case is governed by Brown v. Lensing, 171 F.3d 1031 (5th Cir.1999), which relies on In re Smith, 142 F.3d 832 (5th Cir.1998). Under circumstances indistinguishable from this case, petitioner Brown was denied successive habeas relief because he could not show that any Supreme Court decision renders the Cage decision retroactively applicable to cases on collateral review, as AEDPA now requires. Moreover, the Brown case specifically disapproved the district court's approach in this case. Brown, 171 F.3d at 1032 n.9.
>
> Like cases demand like treatment. Tyler's successive petition fails according to Brown and § 2244(b)(2)(A).
> (Appendix A, p.2).

This opinion was issued on June 1, 2000. Consequently, this Court has jurisdiction under 28 U.S.C. § 1254(1). *See* Supreme Court Rule 13.3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the United States Constitution, provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Title 28, United States Code, Section 2244 provides, in pertinent part:

> (b)(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless --
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; . . .

STATEMENT OF THE CASE

1. INTRODUCTION

Two years ago, in August, 1998, undersigned counsel, acting on behalf of the petitioner Gregory Smith, filed a petition for a writ of *habeas corpus* with this Honorable Court. In that petition, docketed as proceedings #98-5804, Gregory Smith sought to invoke the original jurisdiction of this Court, to present the same two questions being presented in this petition.

In response to Gregory Smith's petition, this Court directed the State of Louisiana to file a brief, and invited the Solicitor General of the United States to file a brief. In the Brief for the United States as Amicus Curiae, the Solicitor General concluded that "[t]he application for a petition for a writ of habeas corpus should be set for full briefing and argument on its merits."

This recommendation notwithstanding, the Court denied Gregory Smith's petition on June 7, 1999, with a notation that "Justice Stevens, Souter, and Breyer would set the case for full briefing."

As a result of this denial, an additional two years have passed with no final resolution of issues of great legal import: did this Court's decision in *Cage v. Louisiana*, 498 U.S. 39 (1990), announce a new rule of constitutional law, one that must be applied retroactively to cases on collateral review? Although most federal courts that have considered the question have concluded that it did, *see e.g., Humphrey v. Cain*, 138 F.3d 552 (5th Cir.)(*en banc*), *cert. denied*, 525 U.S. 935, 119 S.Ct. 348, 365 (1998), for most circuits, it is this Court's determination that is critical.

During these two years, many federal courts have been denying relief to petitioners with '*Cage* claims,' because of the absence of a clear statement from this Court that *Cage* did announce a new rule of law, one that must be applied retroactively. *See, e.g., In re Gregory Smith*, 142 F.3d

832 (5th Cir.1998); *Brown v. Lensing*, 171 F.3d 1031(5th Cir.1999). State courts in these circuits, in turn, have been denying relief, because they do not consider themselves bound by any federal court decisions other than those coming directly from this Court:

> The decision in *Humphrey*[*v. Cain, supra*](or *Wilson* [*v. Cain*, 199 F.3d 439 (5th Cir.1999)) might constitute persuasive authority but will not bind this Court in our interpretation of what federal constitutional law generally requires. * * * (citations omitted). * * *
>
> Unless and until the United States Supreme Court resolves the status of a *Cage/Humphrey* instruction after *Victor* [*v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239 (1994)], our decisions in [*State v.*] *Smith* [637 So.2d 398, *cert. denied*, 513 U.S. 1045, 115 S.Ct. 641 (1994)] and [*State v.*] *Williams*, [708 So.2d 703 (La.1998] as well as our decision in *State ex rel. Taylor v. Whitley*, 606 So.2d 1292 (La.1992)(*Cage* not retroactively applicable to final convictions subject only to collateral attack), and not the decision in *Humphrey*, bind the district courts of this state in reviewing claims that trial judges have read erroneous instructions on reasonable doubt. *See generally* Robert M. Cover and T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035, 1046-1054 (1977).
> *State v. Penns*, 758 So.2d 776 (La.1999).

The net result of these two lines of cases has been to turn this Court's decision in *Cage* into an historical artifact, one with no relevance or meaning to those petitioners whose convictions were obtained through the use of constitutionally flawed jury instructions. This petition presents the Court with the opportunity to revivify *Cage*.

2. THE SPECIFIC FACTS OF THIS PROCEEDING

On March 20, 1975, petitioner Melvin Tyler got into a fight with his girlfriend over whether she would reconcile with her husband. After drinking himself into a rage, he went to her house, stood in the alleyway outside her house, and fired a .22 caliber pistol into a draped and enclosed window. Unbeknownst to him, Tyler's nineteen year-old daughter lay asleep under the window. Tyler's shots caused her death. Tyler was arrested, prosecuted, and convicted of second-degree

murder in the Criminal District Court for the Parish of Orleans, State of Louisiana -- the same court that gave rise to this Court's decisions in *Cage v. Louisiana*, 498 U.S. 39 (1990), and *Sullivan v. Louisiana*, 508 U.S. 275 (1993). See *State v. Tyler*, 363 So.2d 903 (La.1979).

After his conviction and sentence of life imprisonment were affirmed by the Louisiana Supreme Court, Tyler began seeking post-conviction relief, in both state and federal court. Included in these efforts were five petitions for post-conviction relief in the Louisiana courts. *See State ex rel. Tyler v. Maggio*, 428 So.2d 483 (La.1982); *State v. Tyler*, 430 So.2d 92 (La.1983); *State ex rel. Tyler v. State*, 437 So.2d 1142 (La.1983); *State v. Tyler*, 446 So.2d 1226 (La.1984) and *State ex rel. Tyler v. Blackburn*, 494 So.2d 1171 (La.1986).

In 1990, this Court handed down its decision in *Cage, supra*. Because the jury instruction regarding "reasonable doubt" that was given at Tyler's trial was virtually identical to the instruction condemned in *Cage*,[2] in 1995, Tyler filed his sixth petition for post-conviction relief in the state

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[2] At petitioner Tyler's trial, reasonable doubt was defined as follows:

> If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused.
>
> This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a grave uncertainty, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a moral certainty of the defendant's guilt. If, after giving a fair and impartial consideration of all the facts in the case, you find the evidence unsatisfactory upon any single point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.
>
> The prosecution must establish guilt by legal and sufficient evidence beyond a

district court raising *inter alia*, a *Cage* claim, *i.e.*, a claim that his jury had been given an erroneous instruction regarding reasonable doubt. This claim had not previously been raised by Tyler. This petition was denied by the Louisiana Supreme Court in December 1996. *State ex rel. Tyler v. Cain*, 684 So.2d 950 (1996).

Having exhausted his state remedies, Tyler turned to federal court. In April, 1997, Tyler filed a petition in the United States Court of Appeals for the Fifth Circuit for authorization to file a successive petition for federal habeas relief (28 U.S.C. § 2254). *See* the Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(b)(3)(A), which provides as follows:

> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

The Court of Appeals granted Tyler leave to file the successive application, but limited the successive application to "whether Cage v. Louisiana 498 U.S. 39 (1990) should be applied retroactively on collateral review and whether the jury instruction on reasonable doubt was unconstitutional under Cage and Victor v. Nebraska, 511 U.S. 1 . . . ."

Thereafter, Tyler presented his *Cage* claim to the district court, and the Court of Appeals, both of which denied relief, for the reasons noted above. Hence this petition.

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reasonable doubt, but the rule does not go further and require a preponderance of testimony. It is incumbent upon the state to prove the offense charged, or legally included in the indictment, to your satisfaction and beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt. It should be an actual or substantial doubt. It is such a doubt as a reasonable man would seriously entertain. It is a serious doubt for which you could give good reason.

REASONS FOR GRANTING THE PETITION

On its face, the opinion of the Court of Appeals for the Fifth Circuit purports to be a simple and straightforward application of a clear statute to an undisputed set of facts. Behind this opinion, however, are dilemmas which are one part Lewis Carroll, and one part Franz Kafka. Because of the holding in *Humphrey v. Cain*, 138 F.3d 552 (5th Cir.1998)(*en banc*), the Fifth Circuit, and every federal district court in the Fifth Circuit must apply *Cage* retroactively, unless, however, the federal petition is a successive one, in which case relief will be denied, because this Court has never held that *Cage* is to be given retroactive application -- at least in the eyes of the Court of Appeals for the Fifth Circuit.

Every other court of appeals to have addressed the issue has also interpreted this Court's rulings to require the retroactive application of *Cage*. But under the Fifth Circuit's application of the law, the unanimous view of the federal courts on this issue is to be disregarded. Indeed, the very unanimity of the federal courts on the question of retroactivity may have the effect of making it more difficult to for a successive habeas petitioner to surmount the procedural obstacles created by the AEDPA, given this Court's disinclination to decide issues as to which there is no disagreement among the courts of appeals.

These circumstances are legally absurd. They are, however, the inevitable result of interpreting the statute to direct the courts of appeals to disregard any judicial finding of retroactivity that does not come from the Supreme Court -- even if the finding is one of their own. Such legislation stands *Marbury v. Madison*, 5 U.S. 137 (1803) on its head.

I. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT, AND IN A WAY WHICH IS IN CONFLICT WITH TWO OTHER CIRCUIT COURTS OF APPEALS.

In *Cage v. Louisiana*, 498 U.S. 39 (1990), this Court held that a jury instruction which defines reasonable doubt in a manner that allows a finding of guilt based on a degree of proof below that required by the Due Process Clause is improper, and grounds for reversing a conviction obtained using such an instruction.

Three years later, in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court held that a constitutionally deficient reasonable doubt instruction, such as the one given in *Cage*, cannot be harmless error, but is instead "structural error," and thus outside the entire harmless error analysis. In the words of the Court:

> In *[Arizona v.] Fulminante*, [499 U.S. 279 (1991)] we distinguished between, on the one hand, "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," 499 U.S., at 309, and, on the other hand, trial errors which occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented," *id.*, at 307-308. Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort, the jury guarantee being a "basic protectio[n]" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function, *Rose* [*v. Clark*, 478 U.S. 570 (1986)], *supra*, 478 U.S. at 577. The right to trial by jury reflects, as we have said, " a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S., at 155. The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

Sullivan, 508 U.S. at 283.

Plainly, *Cage*, as explained by *Sullivan*, announced a new rule of law.[3] The result in *Cage*

[3] While *Sullivan* was soon followed by *Victor v. Nebraska*, 511 U.S. 1 (1994), *Victor* changed neither the Court's holding in *Cage*, nor *Sullivan*'s determination that when a reasonable doubt jury instruction is constitutionally deficient, it is not subject to a harmless error analysis.

certainly "was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. 288, 301 (1989). Thus, every lower court to consider the question has found that in deciding *Cage*, this Court "announced a new rule [of law]." See, *e.g.*, *Adams v. Aiken*, 965 F.2d 1306, 1312 (4th Cir.1992), *vacated and remanded*, 511 U.S. 1001 (1994), *Humphrey v. Cain, supra, Nevius v. Sumner*, 103 F.3d 453 (9th Cir.1996), *Nutter v. Whitley*, 950 F.2d 1037 (11th Cir.1994), *In re Hill*, 113 F.3d 181 (11th Cir.1997), and *West v. Vaughn*, 204 F.3d 53 (3rd Cir.2000). As the Fifth Circuit wrote in *In re Gregory Smith, Movant*, 142 F.3d 832, 835 (5th Cir.1998):

> It is undisputed that *Cage* announced a new rule of constitutional law. *See Sullivan v. Louisiana*, 508 U.S. 275, 282, 113 S.Ct. 2078, 2083, 124 L.Ed. 2d 182 (1993)(denying right to beyond-reasonable-doubt-jury-verdict is structural defect that takes away "basic protectio[n] whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function.").

Certainly, as a new rule of law, *Cage* cannot be applied retroactively to cases on collateral review, unless it falls into one of the two *Teague* exceptions: (1) if the new rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," *Teague v. Lane*, *supra*, 489 U.S. at 307 (citation omitted), or (2) if the new rule "requires the observance of 'those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Id.* (citation omitted).

However, given this Court's determination that a *Cage* error "unquestionably qualifies as 'structural error,'" the conclusion appears inescapable: a *Cage* error falls under the second *Teague* exception, and the ruling in *Cage* should be applied retroactively to cases on collateral review. This,

Rather, in *Victor* the Court simply determined that the two "reasonable doubt" jury instructions before it were not constitutionally deficient. ("In these two cases, we consider the constitutionality of two attempts to define 'reasonable doubt.'" *Victor*, 511 U.S., 1, 3 (1994)).

of course, is precisely the conclusion reached by the Court of Appeals for the Fifth Circuit in *Humphrey v. Cain*, 138 F.3d 552 (5th Cir.1998)(*en banc*)[4]. And it appears to be the conclusion this Court has already reached in connection with its disposition in *Adams v. Evatt*, 511 U.S. 1001 (1994).

Adams arose from the Fourth Circuit's decision in *Adams v. Aiken*, 965 F.2d 1036 (4th Cir.1992). In *Adams v. Aiken* the Fourth Circuit, prior to *Sullivan*, held that a *Cage* error had occurred, but that *Cage* did not apply retroactively under either the first or the second *Teague* exception. Specifically, as to the second exception, the Fourth Circuit held that a *Cage* error did not affect "the *bedrock procedural elements* essential to the fairness of the proceeding." 965 F.2d 1312 (citation and internal quotation marks omitted).

This Court initially denied certiorari in *Adams*. 508 U.S. 974 (1993). Six days after the decision in *Victor v. Nebraska*, 511 U.S. 1 (1994), however, the Court granted rehearing, and in a one-paragraph opinion, granted the petition for rehearing, granted the petition for a writ of certiorari, vacated the judgment of the Court of Appeals for the Fourth Circuit, and ". . . remanded [the case] to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Sullivan v. Louisiana*, 508 U.S. 275." Since the only claim made in the *Adams* petition for certiorari that related in any way to *Sullivan* was the claim that *Cage* should be applied retroactively, it is evident that the Court's action reflected the view that *Sullivan* had a bearing on the retroactivity issue. On remand, the Court of Appeals for the Fourth Circuit concluded that *Sullivan*'s recognition that *Cage* violations constitute "structural error" dictated that *Cage* was to be applied retroactively.

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[4] It is also the conclusion reached by the Second, Third, Fourth, Tenth, and Eleventh Circuits. *See Tillman v. Cook*, 215 F.3d 1116, 1121-1122 (11th Cir.2000).

Adams v. Evatt, 41 F.3d 175, 178 (4th Cir.1994).

Together, *Teague*, *Cage*, *Sullivan*, and this Court's action in *Adams* point ineluctably to the conclusion -- which the courts of appeals have unanimously adopted -- that *Cage* applies retroactively. Indeed, the Fifth Circuit itself has acknowledged that "the Supreme Court *has made it plain* that *Cage-Victor* errors fit within the second *Teague* exception." *Humphrey v. Cain*, 120 F.3d 526, 529 (5th Cir.1997)(panel opinion adopted by *en banc* court in *Humphrey v. Cain*, *supra*). Under any reasonable construction of the AEDPA, where this Court's decisions so clearly necessitate retroactive application of a new rule, that rule has indeed been "made retroactive to cases on collateral review by the Supreme Court." The Fifth Circuit's contrary decision in this case thus conflicts with controlling decisions of this Court.

Moreover, as indicated above, the Fifth Circuit's decision that a successive petition raising a *Cage* issue may not be filed under 28 U.S.C. § 2244(b)(2)(A) is in direct conflict with the decision of the Ninth Circuit in *Nevius v. Sumner*, 105 F.3d 453 (9th Cir.1996), and in direct conflict with the decision of the Third Circuit in *West v. Vaughn*, 204 F.3d 53 (3rd Cir.2000).

In *Nevius*, a petitioner sought to raise a *Cage* issue in a successive petition. The Ninth Circuit granted leave to file the petition under § 2244(b)(2)(A), noting that the history of this Court's cases on the *Cage* issue indicated that *Cage* must be retroactive, and finding that the petitioner "has made a 'prima facie showing that the application satisfies the requirements of this subsection.'" *Id.* at 462.

West also presents an instance of a petitioner seeking to raise a *Cage* issue in a successive petition. After finding that *Cage* did indeed announce a new rule, the Third Circuit concluded that this Court had never explicitly held *Cage* to be retroactive -- " We are similarly unaware of any such precedent [explicitly stating that the *Cage* rule is to be applied retroactively]" *West*, *supra*, p.59.

However, the *West* court found that this was not the end of the inquiry, because the court was "not convinced that [the phrase] 'made retroactive' [as used in § 2244(b)(2)(A)] deserves the restrictive gloss applied by these [other circuit] courts in construing the term." *West, supra*, p.59. The *West* court then went on to find that this Court's decision in *Sullivan* compelled retroactive application of *Cage*. *West, supra*, pp.61-63.

The Fifth Circuit, however, has specifically rejected the Ninth Circuit's decision in *Nevius v. Sumner*, aligning itself instead with the First Circuit's decision in *Rodriguez v. Superintendent, Bay State Correctional Center*, 139 F.3d 270 (1st Cir.1998), and the Eleventh Circuit's ruling in *In re Hill*, 113 F.3d 181 (11th Cir.1997). In *Rodriguez*, the First Circuit rejected the filing of a habeas petition raising a *Cage* claim. Like the Fifth Circuit, the First Circuit specifically disagreed with *Nevius v. Sumner*, rejected the petitioner's reliance on *Sullivan* and *Adams*, and held that the statute required a decision by this Court directly addressing the question of retroactivity. Similarly, in *In re Hill*, the Eleventh Circuit held that its own prior ruling that *Cage* applies retroactively was unavailing in a successive habeas petition, and denied the petitioner leave to file.

The effect of these varying decisions is that in the nine states of the Ninth Circuit, and the three states and the other territories of the Third Circuit, a state prisoner can file a successive habeas petition raising a *Cage* claim, whereas in the five states that make up the First Circuit, the three comprised in the Fifth Circuit, and the three in the Eleventh Circuit, such a petition may not be filed. This Court should grant plenary review of this petition to resolve this conflict over an important issue of federal law.

II. THE RETROACTIVITY ISSUE IN THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW

If the Court of Appeals for the Fifth Circuit is correct in its position that this Court has never determined (for purposes of § 2244 (b)(2)(A)) whether the rule of law announced in *Cage* is to be applied retroactively, then the reasons for granting this petition become all the more compelling. At least five circuits, the Third, the Fourth, the Fifth, the Tenth, and the Eleventh, have determined that *Cage* is to be given retroactive effect. Nevertheless, even if every other circuit follows their lead, federal relief will be unavailable to any state prisoner filing a successive petition. While one might hope that state courts addressing post-conviction petitions under their own procedures will adhere to rulings made by the federal Courts of Appeal, it is plain from the decision of the Louisiana Supreme Court in *State v. Penns*, *supra*, that this is not going to happen -- at least in Louisiana. Thus, in Louisiana, there is no remedy available to state prisoners -- in any court.

In short, whether any given habeas petitioner receives the constitutional protections to which he or she is entitled by virtue of *Cage* and *Sullivan* has become a question of judicial roulette, not a principled application of the laws.

Petitioner's claim that *Cage* is retroactive is surely substantial, indeed, every federal court to address the issue after *Sullivan* has so held. Ordinarily, such unanimity might be a reason for this Court to deny review of the issue. But here, the need for resolution of the retroactivity issue by this Court follows directly from the interpretation of the AEDPA adopted by the court below, which places a premium not on *what* the proper retroactivity rule is, but on *who* has announced the rule. If the AEDPA is to be so interpreted, then this Court has a special role and responsibility with respect to the resolution of retroactivity issues -- at least where, as here, the claim of retroactivity is

weighty.

Failure by this Court either to reverse the Fifth Circuit's interpretation of the AEDPA or to take on the merits of the retroactivity question would lead to an absurd result. The effect of allowing a ruling like the one below to stand unreviewed would be to create a system where, if a retroactivity question is so close and debatable that it engenders division in the lower courts that this Court ultimately resolves in favor of retroactivity, then the issue may be presented in successive habeas petitions. If, on the other hand, the case for retroactivity is so easy and obvious that the courts of appeals *all agree* and the issue is never addressed by this Court, a successive petition raising the issue is barred. In short, the better the petitioner's claim, the less chance he will have to raise it.[5]

No rational legislature could have intended to create such a system. To restore reason to the law, this Court has two choices: it may interpret the AEDPA to permit the courts of appeals to give effect to the clear import of this Court's decisions when they dictate (but do not directly rule on) the retroactive application of a new rule, or it may decide the retroactivity question itself. Leaving the Fifth Circuit's decision intact is not an acceptable third alternative.

[5] The Fourth Circuit, in an opinion denying a prisoner leave to file a successive petition raising a non-*Cage* claim because this Court had not directly decided the retroactivity issue involved, took note of the jurisprudential awkwardness its interpretation of the AEDPA created in cases presenting easy retroactivity questions: "Of course, it seems unlikely that the Supreme Court would grant certiorari to declare the applicability of a rule announced on direct review to collateral proceedings . . . lower federal courts uniformly rule in favor of collateral availability." *In re Vial*, 115 F.3d 1192, 1196, n. 8 (4th Cir.1997). Despite its recognition of this "*Catch 22*," the Fourth Circuit in *Vial* felt constrained to require a direct retroactivity ruling by this Court as a prerequisite to a successive petition.

CONCLUSION

Wherefore, the foregoing reasons considered, this Court is respectfully urged to grant Melvin Tyler's petition for a writ of certiorari.

New Orleans, Louisiana, this 28th day of August, 2000.

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Attorney for Petitioner
Melvin Tyler

APPENDIX A

U.S. COURT OF APPEALS
FILED
JUN 0 1 2000
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-31159
Summary Calendar

MELVIN TYLER,

Petitioner-Appellant,

versus

BURL CAIN, Warden, Louisiana
State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 97-CV-1549-G

Before JOLLY, JONES, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Melvin Tyler, Louisiana prisoner # 81668, appeals the dismissal of his petition under 28 U.S.C. § 2254. In 1976, Tyler was convicted of one count of second degree murder. He is continuing to serve his sentence of life imprisonment without the benefit of parole, probation, or suspension of sentence for a period of twenty years.

Tyler has requested federal habeas relief following the denial of his numerous state habeas petitions. This court has previously given Tyler permission to file a successive § 2254

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

application on the issues whether Cage v. Louisiana, 498 U.S. 39 (1990), should be applied retroactively on collateral review and whether the jury instruction on reasonable doubt given to his jury was unconstitutional under Cage and Victor v. Nebraska, 511 U.S. 1 (1990). The district court determined that, based upon Humphrey v. Cain, 138 F.3d 552 (5th Cir.)(en banc), cert. denied, 119 S. Ct. 348, 365 (1998), Cage was to be applied retroactively, but it denied relief under the standard set forth by 28 U.S.C. § 2254(d).

The district court erred in not determining first whether Tyler's petition satisfied AEDPA's successive habeas standard, 28 U.S.C. § 2244(b)(2)(A). Procedurally, this case is governed by Brown v. Lensing, 171 F.3d 1031 (5th Cir. 1999), which relies on In re Smith, 142 F.3d 832 (5th Cir. 1998). Under circumstances indistinguishable from this case, petitioner Brown was denied successive habeas relief because he could not show that any Supreme Court decision renders the Cage decision retroactively applicable to cases on collateral review, as AEDPA now requires. Moreover, the Brown case specifically disapproved the district court's approach in this case. Brown, 171 F.3d at 1032 n.9.

Like cases demand like treatment. Tyler's successive petition fails according to Brown and § 2244(b)(2)(A).

For these reasons, only, the judgment of the district court denying habeas relief is **AFFIRMED**.

APPENDIX B

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

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LORETTA G. WHYTE
CLERK

MINUTE ENTRY
SEAR, CHIEF JUDGE
September 8, 1998

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MELVIN TYLER	*	CIVIL ACTION
VERSUS	*	NO. 97-1549
BURL CAIN, WARDEN	*	SECTION "G"

MEMORANDUM AND ORDER

Background

Petitioner Melvin Tyler, a prisoner currently incarcerated in the Louisiana State Penitentiary, Angola, Louisiana, was convicted on February 19, 1976 of one count of second degree murder and sentenced to life imprisonment without the benefit of parole, probation, or suspension of sentence. Tyler directly appealed his conviction to the Louisiana Supreme Court.[1] Following that appeal, he was resentenced to life imprisonment without the benefit of parole, probation, or suspension of sentence for a period of twenty (20) years.

Tyler subsequently filed six (6) applications for post-conviction relief in state court, all of which were denied. In his petition for federal habeas relief, Tyler raises the same two claims he raised in his final post-conviction application in state court. Prior to filing the federal petition, Tyler obtained permission from the United States Fifth Circuit Court of Appeals to file a successive writ.[2] The Fifth Circuit, however, limited his application to the issue of whether Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328 (1990) and Victor v. Nebraska, __ U.S. __, 114 S.Ct. 1239, 127 L.ed.2d 583 (1994) should be applied retroactively on collateral review, and, if so applied, whether the jury instruction given at Tyler's trial was unconstitutional.[3]

Magistrate Judge Louis Moore, Jr. issued a Report and Recommendation in which he recommended that Tyler's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be denied. Because petitioner has filed timely objections to the magistrate's Report and Recommendation, a de novo review of those portions of

[1] The petitioner raised the following arguments on appeal: 1) the trial court improperly denied his Motion to Quash an improper grand jury; 2) the trial court gave an unconstitutionally excessive sentence; and , 3) the trial court gave an improper jury instruction on specific intent. State v. Tyler, 363 So.2d 903 (La. 1978).

[2] In re Melvin Tyler, Doc. No. 97-00165 (U.S. App. 5th Cir. 1997).

[3] Id.

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the findings to which petitioner has objected is required.

Analysis

The first issue to be considered is whether Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328 (1990) and Victor v. Nebraska, __ U.S. __, 114 S.Ct. 1239, 127 L.ed.2d 583 (1994) should be applied retroactively on collateral review of Tyler's case.[1]

---

[1] In determining this, I am not limited solely to United States Supreme Court determinations on its retroactivity as in In re Smith, 142 F.3d 832. In Smith, petitioner was seeking writs from the Fifth circuit to file for a successive habeas application based on a similar allegedly unconstitutional "reasonable doubt" jury charge. In Smith, the Fifth Circuit adopted the view that:

> an application to file a second or successive habeas petition must point to a *Supreme Court decision* that either expressly declares the collateral availability of the rule (such as by holding or stating that the particular rule upon which the petitioner seeks to rely is retroactively available on collateral review) or applies the rule in a collateral proceeding.

Id. at 835, [emphasis added].

The Fifth Circuit additionally stated that Smith was required to make a "prima facie showing" that the Cage rule has been "made retroactive to cases on collateral review by the Supreme Court" as required by § 2244(b)(2)(A).

However, it is not before me to decide whether Tyler is permitted to file this successive *habeas* application in accordance with 28 U.S.C. § 2244(b)(2)(A). The Fifth Circuit has already granted him permission to do so. Nonetheless, they have limited his application to the issue of whether Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328 (1990) and Victor v. Nebraska, __ U.S. __, 114 S.Ct. 1239, 127 L.ed.2d 583 (1994) should be applied retroactively on collateral review of his case

Since the time the Fifth Circuit granted authorization for Tyler to file his *habeas* application, that court had an opportunity to rule on the issue of whether Cage and Victor should be applied retroactively on collateral review. In Humphrey v. Cain, 138 F.3d 552 (5th Cir. 1998), adopting the panel opinion, 120 F.3d 526 (5th Cir. 1997), the Fifth Circuit en banc held that Cage, as clarified by Victor, announced a new rule of constitutional law made retroactive to cases on collateral review. Id. and *See* Messick v. Cain, 1998 WL 473942, (E.D. La).

Therefore, the only remaining question is whether the jury instruction given at Tyler's trial was unconstitutional. In Cage, the Supreme Court held that an instruction containing questionable reasonable doubt language was unconstitutional, because it permitted finding guilt based upon a degree of proof below that required by the Due Process Clause of the Fourteenth Amendment.

Tyler claims the trial court erroneously instructed the jury on reasonable doubt, and that this instruction violated the

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and if so applied, whether the jury instruction given at Tyler's trial was unconstitutional.

Since I am not deciding whether to grant an application to apply for successive writs, I am not governed by 28 U.S.C. 2244(b)(2)(A). Thus, I am not limited to Supreme Court determinations on this issue as Smith was.

Fourteenth Amendment's due process clause by reducing the state's burden of proof against him, as discussed in Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) and Victor v. Nebraska, __ U.S. __, 114 S.Ct. 1239, 127 L.Ed. 583 (1994).

Cage and Victor set the standard by which courts examine the "reasonable doubt" instructions. Cage and Victor affirmed the principle that the charge must not allow the jury to convict unless it is convinced that the evidence demonstrates guilt beyond a reasonable doubt. Victor modified Cage by leaving no uncertainty that the inquiry is "not whether the instruction 'could have' been applied in [an] unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it."[5]

Using this standard, the Fifth Circuit decided Humphrey v Cain, 138 F.3d 552. In Humphrey, the Fifth Circuit sitting en banc held that the complained-of reasonable doubt instruction was unconstitutional, over-ruling prior cases. The jury charge given at Tyler's trial is identical to the charge on reasonable doubt given in Humphry. The issue in this case is whether Tyler's *habeas* application was filed too late to apply the Humphrey ruling.

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[5] Humphrey v. Cain, 120 F.3d 526, 531.

In Humphrey, the petitioner filed his habeas application prior to the April 24, 1996 effective date of the Anti-terrorism and Effective Death Penalty Act (AEDPA), which established a new standards of review for state court decisions in habeas cases. Thus, Humphrey's claims were analyzed under the old version of the habeas statute. The court noted this distinction in Humphrey when it stated,

> Prisoners who file petitions after April 24, 1996, must surmount the formidable barriers erected by the Anti-terrorism and Effective Death Penalty Act. Of course, we do not have the occasion to measure how high those barriers might be. We note only that the . . . heightened standard of review for state prisoners, see 28 U.S.C. § 2254(d)(1), could shut out future petitioners in Humphrey's situation.

Tyler's petition here was filed on March 18, 1997, after the April 24, 1996 effective date of AEDPA. Hence, in order for Tyler to prevail, he must surmount the "formidable barriers" erected in 28 U.S.C. § 2254 (d)(1).[6] In other words, Tyler must show the

---

[6] 28 U.S.C. § 2254 provides:

> Whether jury instruction is unconstitutional and whether a new rule of law is to be applied retroactively are questions of law. On a question of law, this Court may not grant habeas relief with respect to a state court's determination unless the "state court's decision rested on a legal determination that was 'contrary to . . .

state court decision denying him relief on his Cage and Victor claim was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States."

In petitioner's objections to the Magistrates Report and Recommendations, petitioner urges the court to use the Humphrey decision to grant him relief. Since Humphrey was decided under a different habeas standard than the one that applies in this case, Humphrey is inapplicable.

In reviewing petitioner's reasonable doubt instruction, I find his claim unavailing under Cage and its progeny in light of the standards governed by AEDPA. The disputed instruction in this case reads as follows:

> If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused. This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a *grave uncertainty*, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a *moral certainty* of the defendant's guilt. If, after giving a fair and impartial consideration of all of the facts in the case, you find the evidence unsatisfactory upon any single point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.
>
> The prosecution must establish guilt by legal and sufficient evidence beyond a reasonable doubt, but the rule does not go further and require a preponderance of testimony. It is incumbent upon the state to prove the offense charged, or legally included in the indictment, to your satisfaction and beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt. It should be an *actual or substantial doubt*. It is such a doubt as a reasonable man would seriously entertain. It is a serious doubt, *for which you could give good reason*. [Emphasis added.]

This instruction defined reasonable doubt through the use of phrases that have been disapproved in the past, including "grave uncertainty," "moral uncertainty," and "actual or substantial doubt," combined with the explanation that the jury could acquit only if it had "serious doubt, for which you could give good reason." Petitioner argues that this "good reason" limitation on reasonable doubt, in conjunction with other errors, lowered the standard of proof required by due process.

In analyzing this charge under a more stringent AEDPA

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clearly established Federal law, as determined by the Supreme Court.'" 28 U.S.C. § 2254 (d) (1). Lindh v. Murphy, __ U.S. __, 117 S.Ct. 2059 (1997).

standard, the charge is able to pass constitutional muster. Terms such as "substantial basis" in connection with "grave uncertainty" has been recently allowed by the Fifth Circuit, as has "grave uncertainty" used with "moral certainty". *See* Weston v. Ieyoub, 69 F.3d 73 (5th Cir. 1995); and Gaston v. Whitley, 67 F.3d 121 (5th Cir. 1995), cert. denied, 518 U.S. 1023, 116 S.Ct. 2561, 135 L.Ed.2d 1078 (1996). The Fifth Circuit has also upheld instructions using the phrases "substantial doubt" together with "moral certainty." Schnider v. Day, 73 F.3d 610 (5th Cir. 1996); and Bias v. Ieyoub, 36 F.3d 479 (5th Cir.1994).

Moreover, other circuits have refused to reverse convictions with articulation demanding reasonable-doubt instruction such as the one in this case. *See* Chalmers v. Mitchell, 73 F.3d 1262, 1268-69 (2d Cir. 1996); __ U.S. __, 117 S.Ct. 106, 136 L.Ed.2d 60 (1996); Beverly v. Walker, 118 F.3d 900 (2d Cir.1997); and Vargas v. Keane, 86 F.3d 1273,(2d Cir. 1996), cert. denied, __ U.S. __, 117 S.Ct. 240, 136 L.Ed.2d 169 (1996). The Second Circuit held that an instruction survived due process scrutiny in spite of its characterization of reasonable doubt as "doubt for which you can give a reason if called upon to do so by a fellow juror in the jury

room." Vargas at 1277-79.

In Humphry these three phrases read in connection with the good reason limitation was found to deny the petitioner a constitutional jury trial. They found that this jury instruction

> "define[d] reasonable doubt with all the phrases that (although panned by the Court) survived constitutional attack in Victor, but [they] are coupled with an additional potent qualifier. Arguably, jurors were not allowed to entertain doubt without being able to express a good reason. The abiding conviction of guilt to a moral certainty could abide only if the juror could offer a good explanation."
> Humphry at 531.

The Humphry court, in determining the instruction's constitutionality, used the more relaxed standard in Victor.[7] However, when analyzing this charge under a more stringent AEDPA standard, petitioner is not able to surmount the formidable barriers erected by the Anti-terrorism and Effective Death Penalty Act.

Therefore, after reviewing the record and the report of the Magistrate Judge, I find that the state court decision denying Tyler relief was not contrary to any clearly established federal law. Accordingly, Tyler's petition for habeas relief is denied.

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[7] Messick at 3.

After a de novo review of the record, the applicable law, the Report and Recommendation of Magistrate Judge Moore, and Plaintiff's objections to the report, I approve the Magistrate Judge's Report and Recommendation and adopt it as my opinion.

Accordingly,

IT IS ORDERED that plaintiff's suit is DISMISSED WITH PREJUDICE.

MOREY L. SEAR

CHIEF JUDGE

RESPONSE REQUESTED

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Supreme Court, U.S.
FILED
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NO. 00-5961

(3)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

MELVIN TYLER,

Petitioner

v.

BURL CAIN, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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NO. 00-5961

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

MELVIN TYLER,

Petitioner,

v.

BURL CAIN, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The respondent Burl Cain, Warden Louisiana State Penitentiary, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. The opinion is unreported and is attached to respondent's brief as Appendix A. Petitioner adequately states the case and facts.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The issue of whether 28 U.S.C. §2244(b)(2)(A)'s requirement that retroactive application of new rules be made by the Supreme Court itself for successive petitions impermissibly constrains the federal judiciary was not presented to the court below.

Petitioner contends that §2244(b)(2)(A) as interpreted by the Fifth Circuit stands *Marbury v. Madison*, 5 U.S. 137 (1803) on its head. Clearly, the issue of whether the statute violates the separation of powers presents a substantial federal question. However, petitioner did not raise this issue on appeal, nor was it addressed by court below. Because petitioner did not challenge the constitutionality of the statute, the question of whether and to what extent 2244(b)(2)(A) restricts the power of Article III courts and restricts the impact of this Court's jurisprudence was not addressed by the Fifth Circuit. Accordingly, the writ should be denied.

2. The decision below does not raise the Question Presented in the petition regarding the retroactivity of Cage.

Petitioner asks this Court to address the question of whether *Cage* should be applied retroactively, while the Fifth Circuit has addressed this issue in *Humphrey v. Cain*, 138 F.3d 552 (5th Cir.)(en banc), *cert. denied*, 525 U.S. 935 (1998), the only question actually presented by the opinion below is whether this Court has ever made *Cage* retroactive on collateral review. Whether *Cage* is a new rule and if so whether it fits under the second *Teague* exception of "watershed rules of criminal procedure" and rules which will "alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." *Teague*, 489 U.S. 288, 311 (1988), is simply not present in this case, and the Question Presented could only be resolved by rendering an impermissible advisory opinion.

As petitioner correctly states, the Louisiana Supreme Court has not interpreted *Cage* to rise to the level of a "watershed" rule of **criminal procedure** in the vain of *Gideon v. Wainwright*, 372 U.S. 335 (1963).[1] *See, State ex rel. Taylor v. Whitley*, 606 So.2d 1292 (La.1992) As such, a grant of certiorari from a state court decision so holding would be far more appropriate than in this mater where the issue was not addressed.

---

[1] The court saw *Cage* as creating a substantive rule.

Furthermore, the constitutionality of the reasonable doubt jury instruction given at petitioner's trial was not addressed by the Fifth Circuit. Should this Court grant certiorari, the merits of petitioner's claim would not be at issue. While this Court has spoken on the proper standard, a case which presents an opportunity to further address the merits of such a claim would be a more appropriate vehicle to address this issue.

3. The Fifth Circuit did not address the reasoning of West v. Vaughn, and Williams v. Taylor may resolve the split.

Petitioner correctly notes there is a split amongst the circuits as to the proper interpretation of the phrase "made retroactive to cases on collateral review by the Supreme Court."[2] However, the case below was submitted before *West v. Vaughn*, 204 F.3d 53 (3rd Cir. 2000) was decided and the Fifth Circuit did not address the Third Circuit's contrary opinion. Accordingly, this court would not have the benefit of the Fifth Circuit's reasoning in this regard.

Additionally since *West v. Vaughn* was decided this Court delivered its opinion in *Williams v. Taylor*, 529 U.S. 362 (2000) which was the basis for criticizing *West* by the Seventh Circuit in *Talbott v. Indiana*, 226 F.3d 866 (7th Cir. 2000).[3] Accordingly, while a split in the Circuits exists,

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[2] Respondent does not agree that *Nevius v. Sumner*, 105 f.3d 453, 462 (9th Cir. 1996) concluded that this court made *Cage* retroactive in *Adams v. Evatt*, 511 U.S. 1001 (1994). The court held simply that the petitioner had made a *prima facie* showing that his application satisfied §2244(b)(2)(A) and did not "intimate any view " as to whether the petitioner had "in fact met the requirements" of the statute. Indeed, the Fifth Circuit in this case granted petitioner leave to file a successive petition, and nevertheless, concluded that §2244(b)(2)(A) precluded relief. In any case, *West v. Vaughn* still presents a split.

[3] "In *West* the third circuit confused a substantive question ('which decisions apply retroactively?') with a procedural question ('which court makes the retroactivity decision?'). *Cf. Williams v. Taylor*, 529 U.S.362, 120 S.Ct. 1495, 1523, 146 L.Ed 389 (2000)." *Talbott v. Indiana*, 226 F.3d at 868.

the impact of this court's opinion in *Williams v. Taylor* has had little to time to percolate amongst the lower courts. Indeed, the Third Circuit may reevaluate the basis for its holding in light of *Williams v. Taylor*, and for this reason the writ should be denied.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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RESPONSE REQUESTED

Supreme Court, U.S.
FILED
NOV 6 2000
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ORIGINAL

No. 00-5961

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

MELVIN TYLER

Petitioner

versus

BURL CAIN, WARDEN

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF OF PETITIONER MELVIN TYLER

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No. 00-5961

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

MELVIN TYLER

Petitioner

versus

BURL CAIN, WARDEN

Respondent

Petitioner Melvin Tyler, pursuant to Rule 15.6 of the Rules of the Supreme Court, respectfully submits the following reply to the brief in opposition filed in these proceedings by the State of Louisiana.

ARGUMENT

Since the day this Court handed down its opinion in *Cage v. Louisiana*, 498 U.S. 39 (1990), the State of Louisiana has resisted at every turn the application of the legal rules embodied in that decision. The State's persistence, and resistance, have paid off: notwithstanding the fact that hundreds of defendants were convicted at trials where improper reasonable doubt instructions were given, there are only three reported instances of a Louisiana defendant obtaining a new trial in a state post-conviction proceeding because of a *Cage* error. One of these was Tommy Cage himself. *See State ex rel. Cage v. Whitley*, 667 So.2d 519 (La.1996), *State v. Smith*, 600 So.2d 1319 (La.1992)

and *State v. Harrison*, 609 So.2d 789 (La.1992). Consistent with its previous efforts, the State once again seeks to undermine the meaning, and import, of both *Cage*, and *Sullivan v. Louisiana*, 508 U.S. 275 (1993), by asking this Court to deny Tyler's petition for *certiorari*.

The State's arguments are unfortunate -- not merely because they again seek to deny a citizen that to which he has always been entitled -- a fair trial with a properly instructed jury -- but because the arguments also obscure the important federal issues in this case, and the divergence among the courts of appeals on these issues. The three reasons for denying the petition that have been advanced by the State, and the issues actually raised by petitioner, are addressed below.

1. The issue of whether 28 U.S.C. § 2244(b)(2)(A)'s requirement that retroactive application of new rules be made by the Supreme Court itself for successive petitions impermissibly constrains the federal judiciary was not presented to the court below.

It is not clear whether the State has misread the arguments petitioner actually made to this Court, or has deliberately ignored them. Under either alternative, however, the first reason advanced by the State for denying the petition makes little sense. Unquestionably, petitioner did not attack the constitutionality of 28 U.S.C. § 2244(b)(2)(A) in the court below. Nor does he do so in his petition to this Court.

At the time Tyler began his lengthy journey through the state and federal systems, the constitutionality of the statute was simply not at issue. And although the manner in which the lower courts have subsequently interpreted and applied § 2244(b)(2)(A) has raised potential constitutional questions, as noted by Tyler in his original petition, those constitutional questions need not be reached -- indeed, should not be reached in this proceeding. *See New Orleans Broadcasting Association, Inc. v. U.S.*, 527 U.S. 173, 184 (1999) and *Heckler v. Mathews*, 465 U.S. 728, 741-44 (1984).

In short, the State has confused the effects of the present conflicting interpretations of *Cage*, with the cause of those conflicting interpretations. As a consequence, its arguments under this heading do not warrant serious consideration.

2. The decision below does not raise the Question Presented in the petition regarding the retroactivity of Cage.

It was established in the Statement of the Case set forth in Tyler's original petition, (which the State concedes "adequately states the case and facts,") that in April, 1997, Tyler sought and received authorization from the United States Court of Appeals for the Fifth Circuit to file a successive petition for a writ of habeas corpus (28 U.S.C. § 2254) in the United States District Court for the Eastern District of Louisiana. The Court of Appeals specifically limited the successive petition to the questions of whether this Court's decision in *Cage v. Louisiana,* 498 U.S. 39 (1990) **should be applied retroactively**, and if so, whether the jury charge given at Tyler's trial was unconstitutional.

In an order dated September 10, 1998, the district court held that *Cage v. Louisiana,* 498 U.S. 39 (1990) **must be applied retroactively**, because of the *en banc* opinion of the United States Court of Appeals for the Fifth Circuit in *Humphrey v. Cain*, 138 F.3d 552 (5th Cir., 1998)

However, the district court denied Tyler relief, even though the "reasonable doubt" portion of the jury charges given at his trial was indistinguishable from the one struck down by this Court in *Cage*. In the view of the district court, the Anti-terrorism and Effective Death Penalty Act (AEDPA), specifically 28 U.S.C. § 2254 (d)(1), changed the standard of review for state habeas petitioners, and under the "new" standard of review, a '*Cage*-type' instruction like the one given at Tyler's trial was in fact constitutional.

In his appeal Tyler contended that AEDPA did not change the standard of review for state

habeas petitioners. Even assuming that it did, however, Tyler argued that under the "new" standard of review, this Court's decisions in *Cage* and *Sullivan v. Louisiana*, 508 U.S. 275 (1993) were still controlling, and that accordingly, the jury instructions given at his trial were unconstitutional. **Tyler further contended that these decisions should be given retroactive effect on collateral review.**

The Court of Appeals did not reach the substantive issues, but instead concluded that

> [t]he district court erred in not determining first whether Tyler's petition satisfied AEDPA's successive habeas standard, 28 U.S.C. § 2244(b)(2)(A). Procedurally, this case is governed by Brown v. Lensing, 171 F.3d 1031 (5th Cir.1999), which relies on In re Smith, 142 F.3d 832 (5th Cir.1998). **Under circumstances indistinguishable from this case, petitioner Brown was denied successive habeas relief because he could not show that any Supreme Court decision renders the Cage decision retroactively applicable to cases on collateral review, as AEDPA now requires.** Moreover, the Brown case specifically disapproved the district court's approach in this case. Brown, 171 F.3d at 1032 n.9.
>
> Like cases demand like treatment. Tyler's successive petition fails according to Brown and § 2244(b)(2)(A).
> (emphasis added)

In sum, Tyler clearly presented the question of the retroactivity of *Cage* to both the district court, and the Court of Appeals, and both courts addressed it.

The State now urges this Court to deny the petition on the grounds that

> . . . the only question actually presented by the opinion below is whether this Court has ever made *Cage* retroactive on collateral review. Whether *Cage* is a new rule and if so whether it fits under the second *Teague* exception of "watershed rules of criminal procedure" and rules which will "alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." *Teague*, 489 U.S. 288, 311 (1988)[*sic*] is simply not present in this case, and the Question Presented could only be resolved by rendering an impermissible advisory opinion."
> Respondent's Brief in Opposition, p.2

What the State does not appear to understand is that to resolve the question that it admits is presented, *i.e.* whether *Cage* is to be given retroactive effect to cases on collateral review, it is

necessary to determine whether *Cage* does in fact announce a new rule of law. *Teague v. Lane*, 489 U.S. 288, 311-313, (1989). There is simply no legal alternative. And there is nothing "advisory" about the opinion Tyler seeks -- what he seeks is an opinion that will give him a fair trial.

It is true, as the State argues, that the "constitutionality of the reasonable doubt jury instruction given at petitioner's trial was not addressed by the Fifth Circuit." But to suggest that this Court wait for "a case which presents an opportunity to further address the merits of such a claim, [as] a more appropriate vehicle to address this issue" is to advance an argument that must again be described as one part Lewis Carroll and one part Franz Kafka.[1] Unless and until this Court addresses the issue raised by Tyler in his petition, the issue of the constitutionality of jury instructions like those given at his trial will never be reached -- at least not in the First, Fifth, and Eleventh Circuits.

3. The Fifth Circuit did not address the reasoning of West v. Vaughn, and Williams v. Taylor may resolve the split.

In its Brief in Opposition, the State acknowledges the existence of a conflict among the circuits "as to the proper interpretation of the phrase 'made retroactive to cases on collateral review by the Supreme Court'" (Brief in Opposition, p.3). Amazingly, the State views this as a reason for this Court not to hear this case -- an argument that flies in the face of 200 years of judicial history, and Rule 10(a) of the Rules of this Court.

Unquestionably, Tyler's case was decided by the Court of Appeals for the Fifth Circuit before the Third Circuit decided *West v. Vaughn*, 204 F.3d 53 (2000). Consequently, the Fifth Circuit "did not address the Third Circuit's contrary opinion." It is irrational, however, to suggest that this Court wait until it has "the benefit of the Fifth Circuit's reasoning [with regard to the 'Third Circuit's

[1] See Tyler's Petition for a Writ of Certiorari, p. 10.

contrary opinion']." (State's Brief in Opposition, p.3).

First, any future panel of the Fifth Circuit that considers the question will be bound by the previous decisions of that court. *United States v. Taylor*, 933 F.2d 307, 313 (5th Cir.1991). Thus, while a panel of the Fifth Circuit might mention the decision of the Third Circuit in *West v. Vaughn*, *supra*, that panel could never follow it. Accordingly, the only way for this Court to obtain the "benefit" spoken of by the State is if the Fifth Circuit were to sit *en banc* to hear, or re-hear a case presenting the issue. Ironically, such hearings *en banc* are most warranted when "the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed . . . ." FRAP 35(b)(1)(A). Given that there is no Supreme Court decision with which such a Fifth Circuit panel decision might conflict, and the principle of *stare decisis* should prevent the creation a conflict within the Fifth Circuit itself, it could be quite some time before this Court receives the Fifth Circuit's views on the Third Circuit's decision in *West v. Vaughn*. To borrow from Lewis Carroll again: what the State wants is never justice today, but always justice tomorrow.

Second, this Court now has before it the two possible views on the issue: that of the Third and Ninth Circuits, and that of the First, Fifth, and Eleventh Circuits. Waiting for a court in one group to comment on the views of the other is neither meaningful, nor consistent with this Court's responsibilities.

Certainly, in *Talbott v. Indiana*, 226 F.3d 866, 868 (7th Cir.2000), the Court of Appeals for the Seventh Circuit does criticize the Third Circuit's decision in *West v. Vaughn*: "In *West* the third circuit confused a substantive question ('which decisions apply retroactively?') with a procedural question ('which court makes the retroactivity decision?')." However, such evidence of an ever-deepening conflict among the circuits can only mitigate in **favor** of granting Tyler's petition for

certiorari - not against it.

Finally, the State's suggestion that this Court let its decision in *Williams v. Taylor*, 529 U.S 362 (2000) "percolate amongst the lower courts" is not comprehensible. If this Court's opinion in *Williams v. Taylor* is in fact germane to the question of whether this Court should grant Tyler's petition -- and that is not at all clear -- federal law requires that it be applied now -- not after some indefinite percolation period.

CONCLUSION

The State has conceded that Tyler's petition for a writ of *certiorari* "adequately states the case and facts." The State has also acknowledged that Tyler's petition presents the question of "whether this Court has ever made *Cage* retroactive on collateral review." In addition, the State agrees that "there is a split amongst the circuits as to the proper interpretation of the phrase 'made retroactive to cases on collateral review by the Supreme Court.'" Yet despite what would be universally recognized as compelling arguments for a grant of *certiorari*, the State urges this Court do deny Tyler's petition. The State's suggestion should be ignored.

Wherefore, the foregoing reasons considered, this Court is respectfully urged to grant Melvin Tyler's petition for a writ of certiorari.

New Orleans, Louisiana, this 6th day of November, 2000.

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Supreme Court, U.S.
FILED
JAN 22 2001
OFFICE OF THE CLERK

(6)

No. 00-5961

In The

Supreme Court of the United States

MELVIN TYLER,

Petitioner,

versus

BURL CAIN, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed August 28, 2000
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9/17/98 JUDGMENT: ORDERED that pl's cmp is dismissed w/prej by (LGW, Clerk) approved by Judge Morey L. Sear Date signed: 9/16/98

(CLOSED) (nn) [Entry date 09/17/98] [Edit date 09/17/98]

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-00165

IN RE: MELVIN TYLER,

Movant.

Motion for an order authorizing the United States District Court for the Eastern District of Louisiana to consider a successive habeas corpus application

(Filed Apr. 29, 1997)

Before KING, JOLLY, and DENNIS, Circuit Judges.

BY THE COURT:

Melvin Tyler, #81668, has moved this court for an order authorizing him to file a successive 28 U.S.C. § 2254 application in the district court. *See* § 2244 (b) (3) (A). Tyler has made a prima facie showing that he meets the requirements of § 2244 (b) (2). Therefore, IT IS ORDERED that Tyler's motion for authorization to file a successive § 2254 application addressing the issues whether *Cage v. Louisiana*, 498 U.S. 39 (1990) should be applied retroactively on collateral review and whether the jury instruction on reasonable doubt given to his jury was unconstitutional under *Cage* and *Victor v. Nebraska*, 511 U.S. 1 (1994) is GRANTED.

MINUTE ENTRY
SEAR, CHIEF JUDGE
September 8, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MELVIN TYLER	*	CIVIL ACTION
VERSUS	*	NO. 97-1549
BURL CAIN, WARDEN	*	SECTION "G"

MEMORANDUM AND ORDER

(Filed Sep. 10, 1998)

Background

Petitioner Melvin Tyler, a prisoner currently incarcerated in the Louisiana state Penitentiary, Angola, Louisiana, was convicted on February 19, 1976 of one count of second degree murder and sentenced to life imprisonment without the benefit of parole, probation, or suspension of sentence. Tyler directly appealed his conviction to the Louisiana Supreme Court.[1] Following that appeal, he was resentenced to life imprisonment without the benefit of parole, probation, or suspension of sentence for a period of twenty (20) years.

Tyler subsequently filed six (6) applications for post-conviction relief in state court, all of which were denied.

[1] The petitioner raised the following arguments on appeal: 1) the trial court improperly denied his Motion to Quash an improper grand jury; 2) the trial court gave an unconstitutionally excessive sentence; and 3) the trial court gave an improper jury instruction on specific intent. *State v. Tyler*, 363 So. 2d 903 (La. 1978).

In his petition for federal habeas relief. Tyler raises the same two claims he raised in his final post-conviction application in state court. Prior to filing the federal petition. Tyler obtained permission from the United States Fifth Circuit Court of Appeals to file a successive writ.[2] The Fifth Circuit, however, limited his application to the issue of whether *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328 (1990) and *Victor v. Nebraska*, ___ U.S. ___, 114 S.Ct. 1239, 127 L.ed.2d 583 (1994) should be applied retroactively on collateral review, and, if so applied, whether the jury instruction given at Tyler's trial was unconstitutional.[3]

Magistrate Judge Louis Moore, Jr. issued a Report and Recommendation in which he recommended that Tyler's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be denied. Because petitioner has filed timely objections to the magistrate's Report and Recommendation, a *de novo* review of those portions of the findings to which petitioner has objected is required.

Analysis

The first issue to be considered is whether *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328 (1990) and *Victor v. Nebraska*, ___ U.S. ___, 114 S.Ct. 1239, 127 L.ed.2d 583

[2] *In re Melvin Tyler*, Doc. No. 97-00165 (U.S. App. 5th Cir. 1997).

[3] *Id.*

(1994) should be applied retroactively on collateral review of Tyler's case.[4]

---

[4] In determining this, I am not limited solely to United States Supreme Court determinations on its retroactivity as in *In re Smith*, 142 F.3d 832. In *Smith*, petitioner was seeking writs from the Fifth circuit to file for a successive habeas application based on a similar allegedly unconstitutional "reasonable doubt" jury charge. In *Smith*, the Fifth Circuit adopted the view that:

> an application to file a second or successive habeas petition must point to a *Supreme Court decision* that either expressly declares the collateral availability of the rule (such as by holding or stating that the particular rule upon which the petitioner seeks to rely is retroactively available on collateral review) or applies the rule in a collateral proceeding.

Id. at 835, (emphasis added).

The Fifth Circuit additionally stated that Smith was required to make a "prima facie showing" that the *Cage* rule has been "made retroactive to cases on collateral review by the Supreme Court" as required by § 2244(b)(2)(A).

However, it is not before me to decide whether Tyler is permitted to file this successive *habeas* application in accordance with 28 U.S.C. § 2244(b)(2)(A). The Fifth Circuit has already granted him permission to do so. Nonetheless, they have limited his application to the issue of whether *Cage v. Louisiana*, 498 U.S 39, 111 S.Ct. 328 (1990) and *Victor v. Nebraska*, ___ U.S. ___, 114 S.Ct. 1239, 127 L.ed.2d 583 (1994) should be applied retroactively on collateral review of his case and if so applied, whether the jury instruction given at Tyler's trial was unconstitutional.

Since I am not deciding whether to grant an application to apply for successive writs, I am not governed by 28 U.S.C. 2244(b)(2)(A). Thus, I am not limited to Supreme Court determinations on this issue as *Smith* was.

Since the time the Fifth Circuit granted authorization for Tyler to file his *habeas* application, that court had an opportunity to rule on the issue of whether *Cage* and *Victor* should be applied retroactively on collateral review. In *Humphrey v. Cain*, 138 F.3d 552 (5th Cir. 1998), adopting the panel opinion, 120 F.3d 526 (5th Cir. 1997), the Fifth Circuit en banc held that *Cage*, as clarified by *Victor*, announced a new rule of constitutional law made retroactive to cases on collateral review. *Id.* and *See Messick v. Cain*, 1998 WL 473942, (E.D. La).

Therefore, the only remaining question is whether the jury instruction given at Tyler's trial was unconstitutional. In *Cage*, the Supreme Court held that an instruction containing questionable reasonable doubt language was unconstitutional, because it permitted finding guilt based upon a degree of proof below that required by the Due Process Clause of the Fourteenth Amendment.

Tyler claims the trial court erroneously instructed the jury on reasonable doubt, and that this instruction violated the Fourteenth Amendment's due process clause by reducing the state's burden of proof against him, as discussed in *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) and *Victor v. Nebraska*, ___ U.S. ___, 114 S.Ct. 1239, 127 L.Ed. 583 (1994).

Cage and *Victor* set the standard by which courts examine the "reasonable doubt" instructions. *Cage* and *Victor* affirmed the principle that the charge must not allow the jury to convict unless it is convinced that the evidence demonstrates guilt beyond a reasonable doubt. *Victor* modified *Cage* by leaving no uncertainty that the inquiry is "not whether the instruction 'could have' been

applied in [an] unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it."[5]

Using this standard, the Fifth Circuit decided *Humphrey v. Cain*, 138 F.3d 552. In *Humphrey*, the Fifth Circuit sitting en banc held that the complained-of reasonable doubt instruction was unconstitutional, over-ruling prior cases. The jury charge given at Tyler's trial is identical to the charge on reasonable doubt given in *Humphrey*. The issue in this case is whether Tyler's *habeas* application was filed too late to apply the *Humphrey* ruling.

In *Humphrey*, the petitioner filed his habeas application prior to the April 24, 1996 effective date of the Anti-terrorism and Effective Death Penalty Act (AEDPA), which established a new standards of review for state court decisions in habeas cases. Thus, Humphrey's claims were analyzed under the old version of the habeas statute. The court noted this distinction in *Humphrey* when it stated.

> Prisoners who file petitions after April 24, 1996, must surmount the formidable barriers erected by the Antiterrorism and Effective Death Penalty Act. Of course, we do not have the occasion to measure how high those barriers might be. We note only that the . . . heightened standard of review for state prisoners, see 28 U.S.C. § 2254(d)(1), could shut out future petitioners in Humphrey's situation.

Tyler's petition here was filed on March 18, 1997, after the April 24, 1996 effective date of AEDPA. Hence,

---

[5] *Humphrey v. Cain*, 120 F.3d 526, 531.

in order for Tyler to prevail, he must surmount the "formidable barriers" erected in 28 U.S.C. § 2254(d)(1).[6] In other words, Tyler must show the state court decision denying him relief on his *Cage* and *Victor* claim was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States."

In petitioner's objections to the Magistrates Report and Recommendations, petitioner urges the court to use the *Humphrey* decision to grant him relief. Since *Humphrey* was decided under a different habeas standard than the one that applies in this case, *Humphrey* is inapplicable.

In reviewing petitioner's reasonable doubt instruction, I find his claim unavailing under *Cage* and its progeny in light of the standards governed by AEDPA. The disputed instruction in this case reads as follows:

> If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you

---

[6] 28 U.S.C.§ 2254 provides:

> Whether jury instruction is unconstitutional and whether a new rule of law is to be applied retroactively are questions of law. On a question of law, this Court may not grant habeas relief with respect to a state court's determination unless the "state court's decision rested on a legal determination that was 'contrary to . . . clearly established Federal law, as determined by the Supreme Court.' " 28 U.S.C. § 2254 (d) (1). *Lindh v. Murphy*, ___ U.S. ___, 117 S.Ct. 2059 (1997).

must acquit the accused. This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a *grave uncertainty*, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a *moral certainty* of the defendant's guilt. If after giving a fair and impartial consideration of all of the facts in the case, you find the evidence unsatisfactory upon any single point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.

The prosecution must establish guilt by legal and sufficient evidence beyond a reasonable doubt, but the rule does not go further and require a preponderance of testimony. It is incumbent upon the state to prove the offense charged, or legally included in the indictment, to your satisfaction and beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt. It should be an *actual or substantial doubt*. It is such a doubt as a reasonable man would seriously entertain. It is a serious doubt, *for which you could give good reason*. (Emphasis added.)

This instruction defined reasonable doubt through the use of phrases that have been disapproved in the past, including "grave uncertainty," "moral uncertainty," and "actual or substantial doubt," combined with the explanation that the jury could acquit only if it had "serious doubt, for which you could give good reason."

Petitioner argues that this "good reason" limitation on reasonable doubt, in conjunction with other errors, lowered the standard of proof required by due process.

In analyzing this charge under a more stringent AEDPA standard, the charge is able to pass constitutional muster. Terms such as "substantial basis" in connection with "grave uncertainty" has been recently allowed by the Fifth Circuit, as has "grave uncertainty" used with "moral certainty". *See Weston v. Ieyoub*, 69 F.3d 73 (5th Cir. 1995); and *Gaston v. Whitley*, 67 F.3d 121 (5th Cir. 1995), cert. denied, 518 U.S. 1023, 116 S.Ct. 2561, 135 L.Ed.2d 1078 (1996). The Fifth Circuit has also upheld instructions using the phrases "substantial doubt" together with "moral certainty." *Schnider v. Day*, 73 F.3d 610 (5th Cir. 1996); and *Bias v. Ieyoub*, 36 F.3d 479 (5th Cir.1994).

Moreover, other circuits have refused to reverse convictions with articulation demanding reasonable-doubt instruction such as the one in this case. *See Chalmers v. Mitchell*, 73 F.3d 1262, 1268-69 (2d Cir. 1996); ___ U.S. ___, 117 S.Ct. 106, 136 L.Ed.2d 60 (1996); *Beverly v. Walker*, 118 F.3d 900 (2d Cir.1997); and *Vargas v. Keane*, 86 F.3d 1273, (2d Cir. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 240, 136 L.Ed.2d 169 (1996). The Second Circuit held that an instruction survived due process scrutiny in spite of its characterization of reasonable doubt as "doubt for which you can give a reason if called upon to do so by a fellow juror in the jury room." *Vargas* at 1277-79.

In *Humphrey* these three phrases read in connection with the good reason limitation was found to deny the petitioner a constitutional jury trial. They found that this jury instruction

> "define[d] reasonable doubt with all the phrases that (although panned by the Court) survived constitutional attack in Victor, but [they] are coupled with an additional potent qualifier. Arguably, jurors were not allowed to entertain doubt without being able to express a good reason. The abiding conviction of guilt to a moral certainty could abide only if the juror could offer a good explanation."
>
> *Humphrey* at 531.

The *Humphrey* court, in determining the instruction's constitutionality, used the more relaxed standard in *Victor*.[7] However, when analyzing this charge under a more stringent AEDPA standard, petitioner is not able to surmount the formidable barriers erected by the Anti-terrorism and Effective Death Penalty Act.

Therefore, after reviewing the record and the report of the Magistrate Judge, I find that the state court decision denying Tyler relief was not contrary to any clearly established federal law. Accordingly, Tyler's petition for habeas relief is denied.

After a de novo review of the record, the applicable law, the Report and Recommendation of Magistrate Judge Moore, and Plaintiff's objections to the report, I approve the Magistrate Judge's Report and Recommendation and adopt it as my opinion.

Accordingly,

---

[7] *Messick* at 3.

IT IS ORDERED that plaintiff's suit is DISMISSED WITH PREJUDICE.

/s/ Morey L. Sear
MOREY L. SEAR
CHIEF JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-31159
Summary Calendar

MELVIN TYLER,

Petitioner-Appellant,

versus

BURL CAIN, Warden,
Louisiana State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana USDC No. 97-CV-1539-G

(Filed Jun. 01, 2000)

Before JOLLY, JONES, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Melvin Tyler, Louisiana prisoner # 81668, appeals the dismissal of his petition under 28 U.S.C. § 2254. In 1976, Tyler was convicted of one count of second degree murder. He is continuing to serve his sentence of life imprisonment without the benefit of parole, probation, or suspension of sentence for a period of twenty years.

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Tyler has requested federal habeas relief following the denial of his numerous state habeas petitions. This court has previously given Tyler permission to file a successive § 2254 application on the issues whether *Cage v. Louisiana*, 498 U.S. 39 (1990), should be applied retroactively on collateral review and whether the jury instruction on reasonable doubt given to his jury was unconstitutional under *Cage* and *Victor v. Nebraska*, 511 U.S. 1 (1990). The district court determined that, based upon *Humphrey v. Cain*, 138 F.3d 552 (5th Cir.) (en banc), *cert. denied*, 119 S. Ct. 348, 365 (1998), *Cage* was to be applied retroactively, but it denied relief under the standard set forth by 28 U.S.C. § 2254(d).

The district court erred in not determining first whether Tyler's petition satisfied AEDPA's successive habeas standard, 28 U.S.C. § 2244 (b) (2) (A). Procedurally, this case is governed by *Brown v. Lensing*, 171 F.3d 1031 (5th Cir. 1999), which relies on *In re Smith*, 142 F.3d 832 (5th Cir. 1998). Under circumstances indistinguishable from this case, petitioner Brown was denied successive habeas relief because he could not show that any Supreme Court decision renders the *Cage* decision retroactively applicable to cases on collateral review, as AEDPA now requires. Moreover, the *Brown* case specifically disapproved the district court's approach in this case. *Brown*, 171 F.3d at 1032 n.9.

Like cases demand like treatment. Tyler's successive petition fails according to *Brown* and § 2244 (b) (2) (A).

For these reasons, only, the judgment of the district court denying habeas relief is AFFIRMED.

Jan 22, 2001

(6)

Supreme Court, U.S.
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No. 00-5961

In The

Supreme Court of the United States

MELVIN TYLER,

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On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether a petition for a writ of habeas corpus asserting a claim of error under *Cage v. Louisiana*, 498 U.S. 39 (1990), relies on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," within the meaning of 28 U.S.C. § 2244(b)(2)(A) [the Anti-Terrorism and Effective Death Penalty Act].

II.

Whether the new rule of constitutional law announced by this Court in *Cage v. Louisiana*, 498 U.S. 39 (1990) should be made retroactively applicable to petitioners seeking collateral review of their convictions.

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

1. Melvin Tyler
2. Burl Cain, Warden
3. The State of Louisiana

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OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit being reviewed by this Court, *Tyler v. Cain*, #98-31159 (June 1, 2000), is not reported. It is found in the Joint Appendix at pages 14-15. The "Memorandum and Order" of the United States District Court for the Eastern District of Louisiana, which denied Tyler's petition for habeas relief pursuant to 28 U.S.C. § 2254 is also unreported. This "Memorandum and Order" is found in the Joint Appendix at pages 4-13.

JURISDICTION

The United States District Court for the Eastern District of Louisiana had jurisdiction over petitioner's successive application for a writ of habeas corpus under 28 U.S.C. § 1241, an order of the United States Court of Appeals for the Fifth Circuit authorizing the filing of the application under 28 U.S.C. § 1244(a)(3) having been issued on April 29, 1997. The Court of Appeals had jurisdiction over petitioner's appeal from the denial of the application for habeas corpus under 28 U.S.C. §§ 1291 and 2253. A certificate of appealability under 28 U.S.C. § 2253(c) was issued on October 23, 1998. The Fifth Circuit issued its opinion in the case on June 1, 2000, and petitioner timely filed a petition for a writ of certiorari on August 28, 2000, which was granted on December 11, 2000. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Title 28, United States Code, Section 2244 provides, in pertinent part:

> (b)(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; . . .

STATEMENT OF THE CASE

On March 20, 1975, Melvin Tyler got into a fight with his girlfriend over whether she would reconcile with her husband. After drinking himself into a rage, he went to her house, stood in the alleyway outside the house, and fired a .22 caliber pistol into a draped and enclosed

window. Unbeknownst to him, Tyler's twenty-day-old daughter lay asleep under the window. Tyler's shots ricocheted, hitting the infant, causing her death. Tyler was arrested, prosecuted, and convicted of second-degree murder in the Criminal District Court for the Parish of Orleans, State of Louisiana. See *State v. Tyler*, 363 So.2d 902 (La.1978).

At Tyler's trial, the following definition of reasonable doubt was given:

> If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused.
>
> This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a grave uncertainty, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a moral certainty of the defendant's guilt. If, after giving a fair and impartial consideration of all the facts in the case, you find the evidence unsatisfactory upon any single point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.
>
> The prosecution must establish guilt by legal and sufficient evidence beyond a reasonable

> doubt, but the rule does not go further and require a preponderance of testimony. It is incumbent upon the state to prove the offense charged, or legally included in the indictment, to your satisfaction and beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt. It should be an actual or substantial doubt. It is such a doubt as a reasonable man would seriously entertain. It is a serious doubt for which you could give good reason.

After his conviction and sentence of life imprisonment were affirmed by the Louisiana Supreme Court, Tyler began seeking post-conviction relief, in both state and federal court. Included in these efforts were five petitions for post-conviction relief in the Louisiana state courts, and one petition in federal court. *See State ex rel. Tyler v. Maggio*, 428 So.2d 483 (La.1982); *State v. Tyler*, 430 So.2d 92 (La.1983); *State ex rel. Tyler v. State*, 437 So.2d 1142 (La.1983); *State v. Tyler*, 446 So.2d 1226 (La.1984); *State ex rel. Tyler v. Blackburn*, 494 So.2d 1171 (La.1986); and *Tyler v. Butler*, #88cv4929, (E.D.La.), *aff'd, Tyler v. Butler*, #90-3275 (5th Cir.1990).

In November 1990, this Court handed down its decision in *Cage v. Louisiana*, 498 U.S. 39 (1990). Because the jury instruction defining reasonable doubt given at Tyler's trial was virtually identical to the instruction condemned in *Cage*,[1] in 1995 Tyler filed his sixth petition for

[1] Like the instruction condemned in *Cage*, Tyler's jury instruction contained the following phrases: "*It must be such a doubt as would give rise to a grave uncertainty* raised in your minds by reasons of the unsatisfactory character of the evidence; one that would make you feel that you had not *an abiding conviction to a moral certainty of the defendant's guilt. * * * It should be an actual or substantial doubt.*" (Emphasis added.)

post-conviction relief in the state district court, raising *inter alia* a claim that his jury had been given an erroneous instruction regarding reasonable doubt. Tyler had not previously raised this claim.

This petition was denied by the state district court, and then by the Louisiana Supreme Court, in December 1996. *State ex rel. Tyler v. Cain*, 684 So.2d 950 (1996).

Having exhausted his state remedies, Tyler turned to federal court. In early 1997, Tyler filed a petition in the United States Court of Appeals for the Fifth Circuit for authorization to file a successive petition for federal habeas relief under 28 U.S.C. § 2254.[2]

In April 1997, the Court of Appeals granted Tyler leave to file the successive application, but limited the successive application to "whether *Cage v. Louisiana*, 498 U.S. 39 (1990) should be applied retroactively on collateral review and whether the jury instruction on reasonable doubt given to his jury was unconstitutional under *Cage* and *Victor v. Nebraska*, 511 U.S. 1 (1994). . . . " (Joint Appendix, p.3).

Thereafter, Tyler presented his *Cage* claim to the district court. In its order dated September 10, 1998, (Joint

[2] The Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(b)(3)(A), provides as follows:

> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

Appendix, pp.4-13) the district court held that *Cage* must be applied retroactively, because of the *en banc* opinion of the United States Court of Appeals for the Fifth Circuit in *Humphrey v. Cain*, 138 F.3d 552 (5th Cir.1998). (Memorandum and Order, Joint Appendix, pp.7-8).

However, the district court denied Tyler relief. In the view of the district court, the Anti-Terrorism and Effective Death Penalty Act (AEDPA), specifically 28 U.S.C. § 2254(d)(1), changed the standard of review for state habeas petitioners, and under the new standard of review, a "*Cage*-type" instruction like the one given at Tyler's trial was in fact acceptable. (Memorandum and Order, Joint Appendix, pp.11-12).

Tyler timely appealed the judgment of the district court to the Court of Appeals for the Fifth Circuit.

The Court of Appeals did not reach the substantive issues presented by Tyler's appeal, but instead concluded that

> [t]he district court erred in not determining first whether Tyler's petition satisfied AEDPA's successive habeas standard, 28 U.S.C. § 2244(b)(2)(A). Procedurally, this case is governed by *Brown v. Lensing*, 171 F.3d 1031 (5th Cir.1999), which relies on *In re Smith*, 142 F.3d 832 (5th Cir.1998). Under circumstances indistinguishable from this case, petitioner Brown was denied successive habeas relief because he could not show that any Supreme Court decision renders the *Cage* decision retroactively applicable to cases on collateral review, as AEDPA now requires. Moreover, the *Brown* case specifically disapproved the district court's approach in this case. *Brown*, 171 F.3d at 1032 n.9.
>
> Like cases demand like treatment. Tyler's successive petition fails according to *Brown* and § 2244(b)(2)(A).

(Joint Appendix, p.15).

In substance, what the Fifth Circuit held was that Tyler could not obtain relief under *Cage* in a successive habeas petition, even though the Fifth Circuit itself, sitting *en banc* in *Humphrey v. Cain*, 138 F.3d 552 (5th Cir.1998), had held *Cage* retroactively applicable to habeas corpus petitions. Following its rulings in *Smith* and *Brown*, the court ruled that under 28 U.S.C. § 2244(b)(2)(A), it was not enough that the Fifth Circuit (and every other court of appeals to address the issue) had decided that the principles laid down by this Court required that *Cage* be given retroactive effect. In the Fifth Circuit's view, the requirement in § 2244(b)(2)(A) that a successive habeas applicant present a claim that "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," could be satisfied only if this Court itself directly held that *Cage* was retroactive.

Tyler's petition for a writ of certiorari to the Fifth Circuit followed.

SUMMARY OF THE ARGUMENT

Under the AEDPA, a habeas petitioner may obtain relief in a successive petition if, but only if, he or she satisfies the requirements of 28 U.S.C. § 2244(b)(2). That subsection requires dismissal of a successive petition unless the petitioner establishes that he or she is legitimately entitled to rely on either newly established rules of law or newly discovered facts warranting relief. As to newly established law, the statute provides that the successive habeas applicant must show that his claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A).

The AEDPA neither defines the term "new rule of constitutional law" nor provides standards for determining when a "new rule" applies retroactively. This statutory silence, viewed against the backdrop of this Court's habeas corpus jurisprudence, indicates an intent to incorporate this Court's body of cases concerning the definition of new rules and the circumstances under which they are retroactively applicable in habeas proceedings.

The underlying principles of retroactivity are, of course, set forth in this Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989). Under *Teague*, a "new rule" of criminal procedure is one not compelled or dictated by precedent at the time of its announcement by this Court. Such new rules are retroactively applicable only if they either place substantive conduct beyond the reach of criminal punishment or announce "watershed rules" that are essential to the fairness and reliability of criminal proceedings. When a new rule within the meaning of *Teague*

has been "made retroactive" by the Court under the criteria set forth in *Teague*, a successive habeas petition invoking that rule is not subject to dismissal under § 2244(b)(2)(A).

Here, the rule that petitioner Tyler sought to invoke in his successive habeas application is the holding of *Cage v. Louisiana*, 498 U.S. 39 (1990), which condemned the reasonable-doubt instruction given to the jury in Tyler's case. There is no doubt that, from Tyler's standpoint, *Cage* announced a "new rule" under *Teague*, for it postdates the affirmance of his conviction on direct appeal, and it was not dictated by precedent in existence at the time his conviction became final.

Nonetheless, the Fifth Circuit held that Tyler's petition was subject to dismissal under § 2244(b)(2)(A) – not because the *Cage* rule *is not* retroactive (indeed, the Fifth Circuit agrees with the other courts of appeals that it *is* retroactive), but because, in the Fifth Circuit's view, the *Cage* rule has not yet been *"made"* retroactive *by this Court*.

In so holding, the Fifth Circuit has given § 2244(b)(2)(A) a constricted meaning that is not justified by its language. The statute does not require a direct *holding* by this Court that a particular rule is retroactive, but only action by this Court that has the effect of "making" it retroactive. Where precedents of this Court compel the conclusion that a particular new rule must be retroactive, that standard is satisfied.

That is the situation in this case. In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court held that *Cage* error is a "structural error" that is so fundamental to the fairness

and accuracy of a criminal proceeding that it can never be harmless error. The reasoning of the Court in *Sullivan* demonstrates without doubt that *Cage* must also be retroactively applicable in habeas proceedings, for the test for "structural error" is substantively identical to the one used to identify "watershed rules" under *Teague*. *Sullivan* held that *Cage* error necessarily vitiates a conviction, and the reasoning that leads to that result also dictates retroactivity. Indeed, the conclusion is so evident that every court of appeals to consider the issue after *Sullivan* has agreed.

Thus, in a very real sense, this Court *has* "made" *Cage* retroactive. The Court of Appeals' ruling, which is premised solely on the view that *Cage* has not been made retroactive, must therefore be reversed.

Alternatively, even if this Court has not yet "made" *Cage* retroactive within the meaning of § 2244(b)(2)(A), the reasoning of *Sullivan* plainly indicates that it should now do so explicitly. Once the Court takes that step, *Cage* will without question have been "made" retroactive by this Court, and Tyler's successive petition will be proper under § 2244(b)(2)(A). Thus, even if the Court agrees with the Fifth Circuit's construction of § 2244(b)(2)(A), reversal of the decision below will still be required once this Court resolves the question of *Cage*'s retroactivity.

ARGUMENT

I.

A HABEAS PETITIONER WHO CLAIMS *CAGE* ERROR RELIES ON A "NEW RULE OF CONSTITUTIONAL LAW, MADE RETROACTIVE TO CASES ON COLLATERAL REVIEW BY THE SUPREME COURT"

A. *Cage* Announced a "New Rule"

There is no question but that *Cage v. Louisiana* announced a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989), and the AEDPA. As *Teague* makes clear, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government" – that is, when "the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. This definition of a new rule has been repeatedly reaffirmed by the Court. *See O'Dell v. Netherland*, 521 U.S. 151, 156 (1997); *Graham v. Collins*, 506 U.S. 461, 466-467 (1993). As the Court put it in *Goeke v. Branch*, 514 U.S. 115 (1995), the question is "whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." *Id.* at 118 (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)). If an issue was "susceptible to debate among reasonable minds," the resolution of the issue constitutes a new rule. *Butler v. McKellar*, 494 U.S. 407, 415 (1990).

Although the rule of *Cage* was based upon and was consistent with existing precedent, it was not *dictated* by precedent, and was hardly beyond debate by reasonable jurists. While the theoretical foundations for *Cage* were

laid by *In re Winship*, 397 U.S. 358 (1970), and *Jackson v. Virginia*, 443 U.S. 307 (1979), those cases did not by themselves compel the outcome of *Cage* before it was decided, and certainly could not have been viewed as dictating the result at the time Tyler's conviction was affirmed in 1978.[3] As the Fourth Circuit has stated, "Whether a trial

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[3] The Louisiana Supreme Court's treatment of the issue over the years demonstrates that the issue was, at best, uncertain until *Cage* was decided. That court upheld a similar instruction against federal constitutional challenge in 1968, *see State v. Schoonover*, 211 So.2d 273 (La.1968), and after a brief detour in which the court struck down such an instruction in 1982, *see State v. McDaniel*, 410 So.2d 754 (La.1982), the court reverted to upholding such instructions, *see State v. Taylor*, 410 So.2d 224 (La.1982); *State v. Messiah*, 538 So.2d 175 (La.1988). In 1989, the court relied upon *Taylor* and *Messiah* to uphold the jury instruction given at Tommy Cage's trial. *See State v. Cage*, 554 So.2d 39, 41 (La.1989). This, of course, is the decision that ultimately led to this Court's decision in *Cage v. Louisiana* the following year. Remarkably, even after *Cage*, the Louisiana Supreme Court seems to consider the issue an open one. As the court most recently noted in *State v. Penns*, 758 So.2d 776, 777-778 (La.1999):

> In *State v. Smith*, 637 So.2d 398, 406, *cert. denied*, 513 U.S. 1045 (1994), this court held that in light of *Victor v. Nebraska*, 511 U.S. 1 (1994), a so-called *Cage* instruction, *see Cage v. Louisiana*, 498 U.S. 39 (1990) (*per curiam*), did not require reversal of the defendant's conviction on grounds that it diluted the state's burden of proving the accused's guilt beyond a reasonable doubt in violation of due process guarantees. * * * Unless and until the United States Supreme Court resolves the status of a *Cage/Humphrey* instruction after *Victor*, our decisions in *Smith* and [*State v.*] *Williams* [708 So.2d 703 (1998)], as well as our decision in *State ex rel. Taylor v. Whitley*, 606 So.2d 1292 (La.1992) (*Cage* not retroactively applicable to

court's unconstitutional misdescription of the burden of proof in a criminal case violates the Due Process Clause was certainly an open question before *Cage*." *Adams v. Aiken*, 41 F.3d 175 (4th Cir.1994).

This conclusion is shared by every court that has considered the question. *Tillman v. Cook*, 215 F.3d 1116, 1122 (10th Cir.2000); *Gaines v. Kelly*, 202 F.3d 598, 602-03 (2d Cir.2000); *West v. Vaughn*, 204 F.3d 53 (3d Cir.2000); *Rodriguez v. Superintendent, Bay State Correctional Center* 139 F.3d 270, 273-74 (1st Cir.1998); *Humphrey v. Cain*, 138 F.3d 552 (5th Cir.) (*en banc*), *cert. denied*, 525 U.S. 935 (1998); *In re Hill*, 113 F.3d 181 (11th Cir.1997); *Nevius v. Sumner*, 103 F.3d 453 (9th Cir.1996); and *Nutter v. White*, 39 F.3d 1154 (11th Cir.1994). The Fifth Circuit summed the matter up in *In re Smith*, 142 F.3d 832, 835 (5th Cir.1998): "It is undisputed that *Cage* announced a new rule of constitutional law."

B. Section 2244(b)(2)(A) Does Not Require that a New Rule Be "Made Retroactive" by a Direct Holding of this Court

Cage, as a new rule of constitutional law announced by this Court, may serve as the basis for entertaining and granting a successive habeas petition under 28 U.S.C. § 2244(b)(2)(A) if it has been "made retroactive to cases

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> final convictions subject only to collateral attack), and not the decision in *Humphrey* [*v. Cain*, 138 F.3d 552 (5th Cir.1998) (*en banc*), *cert. denied*, 525 U.S. 935 (1998)], bind the district courts of this state in reviewing claims that trial judges have read erroneous instructions on reasonable doubt.

on collateral review by the Supreme Court." The premise of the Fifth Circuit's decision in this case is that the plain meaning of this language permits the filing of a successive petition *only* when there has been a decision of this Court that *directly holds* a new rule retroactive on collateral review – either by explicitly stating that the rule applies retroactively in such proceedings, or by specifically applying the rule in a habeas case. *See In re Smith*, 142 F.3d at 835.

In the view of the Fifth Circuit, absent such a direct holding by this Court, the lower federal courts may not apply the new rule retroactively in a successive habeas petition – even though the Fifth Circuit itself (along with every other federal court of appeals that has reached the issue) has held that the principles of this Court's decisions compel the conclusion that the new rule announced in *Cage does* apply retroactively in habeas proceedings.[4]

The Fifth Circuit's reading of the statute is not, however, commanded by the law's plain language.[5] Moreover, its reading carries with it bizarre consequences for the administration of justice under the habeas corpus statute. The statute is equally susceptible of a reading that avoids

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[4] The result is that in the Fifth Circuit, a state prisoner whose conviction was affirmed before *Cage* is entitled to have *Cage* retroactively applied in an *initial* habeas petition, but not in a *successive* habeas petition.

[5] Reliance on "plain meaning" is hazardous when dealing with the portions of the habeas statute added by the AEDPA, the language of which is often complex and confusing. As this Court has recognized, "in a world of silk purses and pig's ears, the Act is not a silk purse of the art of statutory drafting." *Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

those consequences; a reading that does not necessitate a direct holding by this Court to make a claim retroactively available in a successive habeas petition when retroactivity is the unmistakable import of this Court's rulings. The particular language at issue here – "made retroactive to cases on collateral review by the Supreme Court" – does not yield only a single, unambiguous meaning. Indeed, the meaning ascribed to it by the Fifth Circuit (and other courts that have given it the same reading) is not even its most natural reading.

The statute does not require that a new rule have been "held" retroactive by the Supreme Court, or "applied retroactively" by the Supreme Court – words that would have made it clear that a direct action by the Supreme Court was necessary before a new rule could be relied on in a successive petition. *Cf. Williams v. Taylor*, 120 S. Ct. 1479, 1488 (2000) (*Williams I*).[6] Instead, the statute says only that the rule must be "made retroactive to cases on collateral review by the Supreme Court." As the Third Circuit has recently pointed out, the "many meanings" of "the broader verb 'made' " include "to have 'caused to occur' and 'caused to be or become: put in a certain state or condition.' " *West v. Vaughn*, 204 F.3d 53,

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[6] In *Williams I*, the Court rejected the argument that the use of the term "failed to" in the AEDPA (28 U.S.C. § 2254(e)(2)) was intended to mean simply "did not," with no implication of fault. The Court stated: "Had Congress intended a no-fault standard, it would have had no difficulty making its intent plain. It would have had to do no more than use, in lieu of the phrase 'has failed to,' the phrase 'did not.' " 120 S. Ct. at 1488.

59 (2000) (quoting *Webster's Third New International Dictionary* 1363 (1966)). Similarly, the *Oxford American Dictionary* (1980) includes among sixteen listed definitions of the verb to "make" the following: "to establish (laws or rules or distinctions)," "to cause to exist, to produce," "to result in," and "to cause to be or become."[7] Moreover, the word does not exclude "making" something happen indirectly as well as directly.

Notably, where the drafters of the AEDPA intended to require that something be done directly by a specific court, they made that intention plain. For example, one of the triggers for the new one-year statute of limitations for the filing of a habeas petition is "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2244(d)(1)(C). This formulation makes clear that it is the Supreme Court itself that must "initially recognize" and "newly recognize" a right to start the running of the statute of limitations, as distinct from the less specific requirement that the right be "made retroactively applicable." Similarly, § 2244(c) makes judgments of this Court conclusive on issues of fact or law "actually adjudicated by the Supreme Court." And § 2254(d)(1) provides that only "clearly established Federal law, as determined by the Supreme Court of the United States," may serve as the basis for habeas relief, making clear that "this Court's

[7] *Cf. Williams I*, 120 S. Ct. at 1488 (noting multiple dictionary definitions of "fail").

jurisprudence" is the exclusive source of clearly established law. *Williams v. Taylor* (*Williams II*), 120 S. Ct. 1495, 1523 (2000).

Under § 2244(b)(3), which requires "authorization" by a court of appeals before any successive petition is filed, the drafters of the statute went out of their way to make clear that such "authorization" by the court of appeals must be direct and express, by requiring the petitioner to file a motion in the court of appeals and requiring the court of appeals to "grant or deny the authorization" within 30 days of the filing of the motion. With equal specificity, 28 U.S.C. § 2255 provides for appointment of counsel "except as provided by a rule *promulgated by* the Supreme Court" (emphasis added).

In all these instances, the statutory language makes unmistakably plain that a particular court must do something actively, directly, and expressly. By contrast, the language of § 2244(b)(2)(A) requires only that this Court must have done (or do) something that has the effect of "making" a new rule retroactive in collateral proceedings. Of course, this language "obviously encompasses direct retroactive application of a rule by the Supreme Court or express statements to that effect," but those meanings do not "exhaust the phrase." *West v. Vaughn*, 204 F.3d at 59. As the Third Circuit has recognized, the language raises the question "whether there are alternative methods through which the Supreme Court could cause a rule to become retroactive." *Id.* The answer is definitely yes.

An example makes the point. In *Bousley v. United States*, 523 U.S. 614, 621 (1998), this Court held that the *Teague* rule of nonretroactivity does not apply to new

decisions that "hol[d] that a substantive federal criminal statute does not reach certain conduct." *Id.* at 620. Rather, after *Bousley*, such decisions are *automatically* retroactive in cases on collateral review. *See id.* It was, of course, necessary for the Court to decide *Bousley* in order to resolve a conflict among the Circuits over the retroactivity of the Court's decision in *Bailey v. United States*, 516 U.S 137 (1995).

After *Bousley*, however, retroactivity is no longer an open issue when the Court decides such cases as *Jones v. United States*, 120 S. Ct. 1904 (2000) (limiting scope of 18 U.S.C. § 844(i)), or *Cleveland v. United States*, 121 S. Ct. 365 (2000) (holding that licenses are not "property" under mail and wire fraud statutes). There can be no doubt that, in light of *Bousley*, this Court "makes" such rulings retroactive in cases on collateral review merely by issuing them: their retroactivity goes without saying. But under the Fifth Circuit's construction of "made retroactive to cases on collateral review by the Supreme Court," that is not good enough. Unless this Court were to go through the pointless exercise of taking a case merely to establish what any reasonable jurist would already know was the law, successive petitions seeking the retroactive application of such new rulings would be barred, even though it must be apparent to everyone that the rulings have in fact been "made retroactive."[8]

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[8] This particular consequence might not often arise for petitions filed under 28 U.S.C. § 2254, to which § 2244(b)(2)(A) is applicable, because this Court does not define the substantive scope of state criminal statutes. But the *Bousley* principle of automatic retroactivity also applies to decisions holding that certain conduct (for example, flag-burning) may not constitutionally be criminalized. *See Bousley*, 523 U.S. at 620. Such rulings, of course, are applicable to state statutes and may be invoked by state prisoners through petitions under § 2254. Moreover, 28 U.S.C. § 2255, the avenue through which federal prisoners seeking the retroactive application of this Court's rules of substantive federal criminal law must obtain relief, contains precisely the same requirement that successive motions not based on newly discovered evidence must invoke "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." The Fifth Circuit's interpretation of "made retroactive" would thus potentially choke off access to the court for both state and federal prisoners in cases involving rules that, under *Bousley*, are necessarily retroactive.

As this example illustrates, the most vexing consequence of the Fifth Circuit's construction of the statute is that it creates an absurd dilemma: either this Court must take up and decide retroactivity issues that are so obvious that they do not meet the ordinary standards for the exercise of this Court's certiorari jurisdiction, or prisoners will be denied the right to file successive habeas petitions in precisely the circumstances where such petitions are most clearly justified – that is, when this Court has issued a new rule that all would agree is entitled to retroactive effect on collateral review. The statute itself reflects a recognition that a prisoner *should* be permitted to obtain habeas relief through a successive petition when this Court has established a new rule of constitutional law that was not previously available to the prisoner and that is retroactive in habeas proceedings. If, however, this Court must explicitly decide the retroactivity question before a new rule becomes available to successive habeas petitioners, the perverse consequence will be that *the more obvious it is that a rule should be retroactive, the less likely it*

is that a successive petitioner will be able to avail himself of it – for this Court generally will issue a writ of certiorari only to decide a doubtful issue that has divided the lower courts, not one whose resolution is so easy that it has led to unanimity below.

This case provides a striking illustration. Seven of the twelve regional Circuits have addressed the issue of *Cage*'s retroactivity. All seven have held that this Court's ruling in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), although not addressing retroactivity directly, compels the conclusion that *Cage* must be given retroactive effect. *See Gaines v. Kelly*, 202 F.3d 598, 602-03 (2d Cir.2000); *West v. Vaughn*, 204 F.3d 53 (3d Cir.2000); *Adams v. Aiken*, 41 F.3d 175 (4th Cir.1994); *Humphrey v. Cain*, 138 F.3d 552 (5th Cir.) (*en banc*), *cert. denied*, 525 U.S. 935 (1998); *Harmon v. Marshall*, 69 F.3d 963 (9th Cir.1995); *Tillman v. Cook*, 215 F.3d 1116, 1122 (10th Cir.2000); *Nutter v. White*, 39 F.3d 1154 (11th Cir.1994). Such uniformity among the lower courts ordinarily would "obviat[e] the need for the Supreme Court to make a future, more explicit pronouncement on whether *Cage* should be applied retroactively." *West v. Vaughn*, 204 F.3d at 62. Under the Fifth Circuit's view of § 2244(b)(2)(A), the very unanimity among the courts of appeals that *Cage* must be retroactive would effectively bar petitioners such as Tyler from raising it.

Of course, this Court has now granted certiorari in this case in part to resolve the question whether *Cage* should be given retroactive effect. But absent the direct conflict among the courts of appeals over the construction of § 2244(b)(2)(A) created by the Third Circuit's decision in *West v. Vaughn*, there is strong reason to doubt

whether this Court would have considered it worthwhile to address the retroactivity question on which all the lower courts have agreed, and successive habeas petitioners in the Fifth Circuit (and other circuits that have adopted a similar construction of § 2244(b)(2)(A)) would simply be out of luck.[9] Unless this Court imposes upon itself the burden of deciding retroactivity issues that do not satisfy the normal standards for review by this Court, adoption of the Fifth Circuit's construction of § 2244(b)(2)(A) will leave future habeas petitioners in the same predicament, in which the easier the retroactivity issue is, the harder it is to obtain relief.

It is axiomatic that, where it is possible, a statute should be read to avoid results that are absurd, unreasonable, and contrary to the underlying purpose of the law. *See American Tobacco Company v. Patterson*, 456 U.S. 63, 71 (1982). The construction of § 2244(b)(2)(A) that the Fifth Circuit has adopted leads to precisely such consequences. To avoid them, the Court should adopt a more plausible and natural reading of the statute, under which a new decision of this Court establishing a constitutional right is "made retroactive" by this Court when the principles of

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[9] In 1999, for example, before the decision in *West v. Vaughn* made the conflict over § 2244(b)(2)(A) inescapable, this Court (with three Justices dissenting) declined to give plenary consideration to an application for an original writ of habeas corpus raising the *Cage* retroactivity issue in *In re Smith*, 119 S. Ct. 2064 (1999), despite the Solicitor General's urging that the case be set for briefing and argument. The result was that the Fifth Circuit's decision denying Mr. Smith leave to file a successive application seeking retroactive relief under *Cage* was allowed to stand. *See In re Smith*, 142 F.3d at 842.

this Court's decisions compel the conclusion that it must be retroactive. Given the narrowness of the exceptions to the retroactivity rules of *Teague*, such cases will doubtless be rare, but they will be precisely the cases in which allowing habeas corpus relief is necessary to vindicate fundamental principles and avoid unjust results. As demonstrated below, cases involving claims of *Cage* error fall into that category.

C. The Rule in *Cage* Has Been "Made Retroactive" to Cases on Collateral Review by this Court

Under *Teague*, the new rule of constitutional law announced by the Court in *Cage* is retroactively applicable to cases on collateral review if it falls within one of two "narrow exceptions" to *Teague*'s general nonretroactivity principle. The first exception, inapplicable here, is for rules that "plac[e] 'certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe.' " *Teague*, 489 U.S. at 307 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (opinion of Harlan, J.)). The second exception applies to "watershed rules of criminal procedure" that "implicate the fundamental fairness of the trial" and are "central to an accurate determination of innocence or guilt." *Teague*, 489 U.S. at 311, 312, 313. This Court's decision in *Sullivan v. Louisiana*, 508 U.S. 276 (1993), compels the conclusion that the *Cage* rule falls squarely within the second exception.

In *Teague*, the Court expressly adopted Justice Harlan's view of retroactivity for cases on collateral review, as set forth in his opinion in *Mackey v. United States*, 401

U.S. 667, 675 (1971) – including Justice Harlan's view that there were but two exceptions to the rule. *Teague*, 489 U.S. at 311-12. *Teague* elaborated on the nature of the second exception, which in Justice Harlan's formulation applied to new rules requiring the observance of " 'those procedures that . . . are "implicit in the concept of ordered liberty." ' " *Teague*, 489 U.S. at 311 (quoting *Mackey*, 401 U.S. at 693). According to the *Teague* Court, Justice Harlan's language left "no doubt" that this second exception was "to be reserved for watershed rules of criminal procedure." *Id.*

Teague went on to emphasize that the "watershed rules" exception was limited to new rules that combined two essential characteristics, both derived from Justice Harlan's opinions on retroactivity. *See Teague*, 489 U.S. at 312. First, a rule falling within the second exception must be "central to an accurate determination of innocence or guilt" – that is, it must establish "procedures without which the likelihood of an accurate conviction is seriously diminished." *Id.* at 313. Second, "the procedure at issue must implicate the fundamental fairness of the trial." *Id.* at 312. In Justice Harlan's words, the new rule must " 'alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction.' " *Id.* (quoting *Mackey*, 401 U.S. at 693-94) (emphasis in *Teague*).

Subsequent decisions of this Court have reiterated these basic elements of the second *Teague* exception. For example, in *Sawyer v. Smith*, 497 U.S. 227 (1990), the Court summarized the exception as follows: "A rule that qualifies under this exception must not only improve accuracy,

but also ' "alter our understanding of the *bedrock procedural elements*" ' essential to the fairness of a proceeding." *Id.* at 242 (citation omitted). *See also, e.g., Graham v Collins*, 506 U.S. 461, 478 (1993); *Butler v. McKellar*, 494 U.S. 407, 416 (1990).

A rule that satisfies these stringent limitations is in select company indeed. That the rule in *Cage* falls within this "small core of rules" (*Graham v. Collins*, 506 U.S. at 478), however, has already been effectively determined by this Court's holding in *Sullivan v. Louisiana* that the *Cage* rule is in the equally exclusive company of those rules that are so fundamental to the fairness of a proceeding and so essential to the accurate determination of guilt or innocence that their violation can *never* be harmless error.

In *Sullivan*, the Court held that a jury instruction identical to the one held unconstitutional in *Cage* was one of those few "structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards." *Sullivan*, 508 U.S., at 281 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)). The Court rested this conclusion on the role of a constitutionally adequate reasonable doubt instruction in ensuring the fundamental right to trial by jury, which "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.' " *Id.* at 277. Moreover, the Court emphasized, "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt" – a verdict that cannot ever come into being when an improper reasonable-doubt instruction is given. *Id.* at 278. As the Chief Justice put it in his concurring opinion, "A constitutionally deficient

reasonable-doubt instruction will *always* result in the absence of 'beyond a reasonable doubt' jury findings." *Id.* at 285 (Rehnquist, C.J., concurring) (emphasis added). Or, to use the majority's succinct formulation, "a misdescription of the burden of proof" "vitiates *all* the jury's findings." *Id.* at 281 (emphasis in original).

From these premises, the Court reasoned that an unconstitutional reasonable doubt instruction necessarily destroys the fairness and reliability of a criminal trial. In the words of the Court:

> Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort [structural defects], the jury guarantee being a basic protection whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function, *Rose* [*v. Clark*, 478 U.S. 570], at 577 [(1986)]. The right to trial by jury reflects, we have said, "a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. [145], at 155 [(1968)]. The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.

Id. at 281-82.

The conclusion that the *Cage* rule is "structural error" that is not amenable to harmless error review necessarily implies that the *Cage* rule falls within the second *Teague* exception, for the two tests are essentially identical. Both are designed to isolate a very small class of procedures so fundamental that this Court will not tolerate a conviction

when they have been violated.[10] And both have the same focus on identifying procedures that are simultaneously essential to the fundamental fairness of a proceeding and to the reliability of the determination of innocence or guilt. As the Court explained in *Arizona v. Fulminante*, 499 U.S. 279 (1991), which established the standard for identifying structural errors that was applied in *Sullivan*, a structural error is one that deprives the defendant of those "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Id.* at 310 (quoting *Rose v. Clark*, 478 U.S. at 577-78). The twin requirements of reliability and fundamental fairness are perfectly congruent with the elements of the second *Teague* exception.

Moreover, the specific factors emphasized by the *Sullivan* Court in explaining why *Cage* errors are structural defects also point ineluctably to the conclusion that *Cage* announced a "watershed rule" within the meaning of *Teague*. First, as *Sullivan* repeatedly emphasized, *Cage* error fundamentally undermines the reliability of a trial's outcome. The *Cage* rule is designed to protect the reasonable-doubt standard, which itself "guards against conviction of the innocent by ensuring the *systematic* accuracy of the criminal system." *Nutter v. White*, 39 F.3d 1154, 1157

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[10] *Compare Teague*, 489 U.S. at 313 ("we believe it unlikely that many such components of basic due process have yet to emerge") *with Neder v. United States*, 527 U.S. 1 (1999) ("We have found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases.' ")

(11th Cir.1994). The impact of an improper reasonable-doubt instruction, the *Sullivan* Court stated, was "unquantifiable," "indeterminate," and "unmeasurable," but an erroneous instruction under *Cage* deprived the defendant of rights *"without which a criminal trial cannot reliably serve its function."* *Sullivan*, 508 U.S. at 281-82 (emphasis added). Indeed, as *Sullivan* emphasized, *Cage* error not only deprives the defendant of a *reliable* determination of guilt or innocence; in a very real sense, it means that *there has been no verdict at all. Id.* at 279-81. The error thus renders it "impossible to assess the accuracy of the conviction." *Nutter*, 39 F.3d at 1157. In *Teague*'s terms, the *Cage* rule is "central to an accurate determination of innocence or guilt," 489 U.S. at 313, for when *Cage* has been violated there can be no accurate determination of innocence or guilt.

Similarly, *Sullivan* makes clear that *Cage* falls within the category of rules that "implicate the fundamental fairness of the trial." *Teague*, 489 U.S. at 312. *Sullivan*'s central point is that *Cage* error deprives a defendant of what can only be called a "bedrock element" of procedural fairness: the right to have the *jury* make the essential determination of guilt beyond a reasonable doubt. Nothing can be more evident from a reading of the opinion than that the Court regarded the protections of *Cage* as fundamental to the fairness of the proceeding. Thus, *Sullivan* makes clear that *Cage* falls within the category of opinions that, as *Teague* put it, "alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." *Teague*, 489 U.S. at 311. Lest there be any doubt on the

point, the *Sullivan* opinion echoes this passage from *Teague* when it states bluntly that *Cage* error "vitiates *all* the jury's findings." *Sullivan*, 508 U.S. at 281.

Thus, the reasoning of *Sullivan* necessarily makes *Cage* retroactive under *Teague*. This conclusion finds further support in the Court's action in *Adams v. Evatt*, 511 U.S. 1001 (1994). *Adams* arose from the Fourth Circuit's decision in *Adams v. Aiken*, 965 F.2d 1036 (4th Cir.1992), in which that court held, prior to *Sullivan*, that *Cage* did not apply retroactively under either the first or the second *Teague* exception. As to the second exception, the Fourth Circuit held that a *Cage* error did not affect "the *bedrock procedural elements* essential to the fairness of the proceeding." 965 F.2d 1312 (citation and internal quotation marks omitted).

This Court initially denied certiorari in *Adams*. 508 U.S. 974 (1993). Six days after the decision in *Victor v. Nebraska*, 511 U.S. 1 (1994), however, the Court granted rehearing, and, in a one-paragraph order, granted the petition for a writ of certiorari, vacated the judgment of the Court of Appeals for the Fourth Circuit, and "remanded [the case] to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Sullivan v. Louisiana*, 508 U.S. 275." Since the only claim made in the *Adams* petition for certiorari that related in any way to *Sullivan* was the claim that *Cage* should be applied retroactively, it is evident that the Court's action reflected the view that *Sullivan* had a bearing on the retroactivity issue.

On remand, the Fourth Circuit took the point immediately, and concluded that *Sullivan*'s recognition that

Cage violations constitute structural error dictated that *Cage* was to be applied retroactively. *Adams v. Aiken*, 41 F.3d 175, 178 (4th Cir.1994). As the Fourth Circuit explained:

> In view of . . . *Teague*'s second exception, the question arises whether the remedy for an unconstitutional reasonable doubt instruction should be applied retroactively. The answer is found in *Sullivan*'s explanation of the crippling effects of such an instruction: "a misdescription of the burden of proof . . . vitiates *all* the jury's findings." Without a jury's constitutional finding of guilt, a conviction lacks both "accuracy" and one of the "*bedrock procedural elements* essential to the fairness of the proceeding."

Id. at 178 (citations omitted; emphasis in original).

Every other court of appeals to face the issue has reached the same conclusion. The Fifth Circuit, which had previously held *Cage* not to be retroactive, overruled itself *en banc* after *Sullivan*, holding that "the Supreme Court *has made it plain* that *Cage-Victor* errors fit within the second *Teague* exception." *Humphrey v. Cain*, 120 F.3d 526, 529 (5th Cir.1997) (emphasis added) (panel opinion adopted by *en banc* court in *Humphrey v. Cain, supra*). As noted above, the Second, Third, Ninth, Tenth and Eleventh Circuit have also held that *Sullivan* requires retroactive application of *Cage* (*see* cases cited *supra* p. 20), and no court since *Sullivan* has disagreed. All these courts of appeals have reached the same conclusion: that *Sullivan*'s reasoning conclusively demonstrates that the *Cage* rule vindicates the values of reliability and fundamental fairness that require retroactivity under *Teague*'s second exception.

Together, *Teague*, *Cage*, *Sullivan*, this Court's action in *Adams*, and the unanimous response of the courts of appeals compel the conclusion that this Court's precedents have made *Cage* retroactive. Under any reasonable construction of the AEDPA, where this Court's decisions so clearly necessitate retroactive application of a new rule, that rule has indeed been "made retroactive to cases on collateral review by the Supreme Court."

II.

IF *CAGE* HAS NOT YET BEEN "MADE RETROACTIVE" BY THIS COURT WITHIN THE MEANING OF THE AEDPA, THIS COURT SHOULD NOW MAKE IT SO

If, contrary to our argument, a new rule can be "made retroactive" by this Court under 28 U.S.C. § 2244(b)(2)(A) *only* by a *direct* holding of this Court, this Court should proceed to make *Cage* retroactive by affirmatively answering the second question presented: "Whether the new rule of constitutional law announced by this Court in *Cage v. Louisiana*, 498 U.S. 39 (1990) should be made retroactively applicable to petitioners seeking collateral review of their convictions." As we have demonstrated, *Sullivan*'s reasoning conclusively demonstrates that the *Cage* rule falls within the second *Teague* exception. Therefore, if *Sullivan* has not already "made" *Cage* retroactive, this Court should do so now. On remand, with *Cage* having been "made retroactive by this Court," petitioner Tyler will be eligible for relief under § 2244(b)(2)(A) if he otherwise is able to establish that his

trial was indeed infected by *Cage* error, and if the other requirements of the habeas statutes are satisfied.

CONCLUSION

For the foregoing reasons, the Court should hold that its decision in *Cage v. Louisiana* is a new rule of law that has been made retroactive (or is now retroactive) to cases on collateral review. Accordingly, the Court should reverse the decision of the Court of Appeals for the Fifth Circuit in these proceedings and remand for further proceedings.

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In The

Supreme Court of the United States

MELVIN TYLER,

Petitioner,

v.

BURL CAIN, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED

I.

Whether 28 U.S.C. §2244(b)(2)(A)'s prohibition on successive petitions that do not rely on a "new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court," requires that the new rule be specifically declared retroactive by this Court or whether an appeals court may examine this Court's precedent to determine whether the new rule is of the type available to those proceeding on collateral review?

II.

Whether *Cage v. Louisiana* falls within the second *Teague* exception of watershed cases of constitutional law?

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STATUTE

28 U.S.C. § 2244..... *passim*

OPINIONS OF THE COURTS BELOW

The opinion of the court of appeals is not reported. It is found in the Joint Appendix at pages 14-15. The opinion of the district court is not reported. It is found in the Joint Appendix at pages 3-13.

STATUTORY PROVISIONS INVOLVED

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

STATEMENT OF FACTS

Sometime near 2:00 a.m. on March 20, 1975, Melvin Tyler telephoned his estranged lover, Gloria Augustine wanting to know if she would return to him, or if she planned on reuniting with her husband. She replied no to each question and informed him that she was hanging up the telephone. (Tr. p. 66) Approximately five to ten minutes later, without warning, Melvin Tyler fired five shots

from a twenty-two caliber revolver into the bedroom of Gloria Augustine. (Tr. p. 57) Tyler's own child, a newborn, Melba Augustine, was struck by three separate bullets, in the head, chest and hand, and died. (Tr. pp. 3-6) The bullets were fired through a square piece of cardboard covering a broken segment of the bedroom window. (Tr. pp. 12, 66) Powder burns on the cardboard indicated the gun was fired from a distance of one to three inches. (Tr. p. 32) The child was laying on a bed directly in front of and against the window. Gloria and her husband, Joseph Augustine, were also in the room on the bed or an adjacent bed. (Tr. pp. 57, 65)

Shortly after the shots were fired, Tyler began throwing bricks through nearly all the windows of the residence including the window adjacent to where the child lay. (Tr. pp. 10-11, 57, 67- 68) Gloria Augustine went to the aide of the newborn and then called out to Tyler, "Melvin my baby is dead." He responded, "Bitch I am going to kill you" and threw another brick through a window. (Tr. pp. 57, 68) In the house next door, Gloria Augustine's sister, Erma Damango, hearing all that was transpiring, called out to Tyler to stop, that the children were in the house. He responded by telling her to shut up, that he was "going to get the bitch," either "next" or "first." (Tr. p. 48)

Upon seeing that Tyler was about to gain entry into the house through the front door, Gloria Augustine, carrying the child, and Joseph Augustine fled out of the rear of the house. (Tr. p. 10-11, 74) Gloria entered her sister's house next door. When the two women heard shaking at the back door, the sister moved the refrigerator in front of it. (Tr. p. 69) Whereupon, Tyler threw a brick through a window at that residence. (Tr. p. 69) In the alleyway,

Joseph Augustine confronted Tyler and the two struggled until Tyler fled the area. (Tr. p. 58) The gun was recovered in the rear of a neighbor's residence. (Tr. p. 78)

At trial Tyler testified that he had been drinking and that after talking to Gloria he was "steamed" and did not have the intent to kill or hurt anyone especially not his daughter. (Tr. pp. 91-92)

SUMMARY OF ARGUMENT

The clear intent of 28 U.S.C. § 2244(b)(2)(A) is that only rules that have been explicitly determined by this Court to fall within one of the two exceptions to *Teague*'s prohibition against the retroactive application of new rules of constitutional law may serve as the basis for a successive writ of habeas corpus. Every court to have considered the issue, with the exception of the Third Circuit in *West v. Vaughn*, 204 F.3d 53 (3d Cir. 2000), has determined that the plain implication of the statute, notwithstanding the reviewing court's own consideration of the issue, is that only this Court can make new rules retroactive for purposes of succesive petitions by holding so directly.

The interpretation adopted by the Third Circuit, and advanced by petitioner, is inconsistent with the sections respect for the finality for criminal judgments. Absent an affirmative statement from this Court, the courts of appeals will no doubt be lead to varying and inconsistent determinations of the availability of new rules to prisoners attempting to file successive petitions. Furthermore, that Congress did not anticipate the interpretation advanced by petitioner, is reflected in the concurrent

requirements of § 2244 regarding a prima facie showing that the requirements of the section be satisfied, and that the motion to file successive petitions be ruled on within thirty days, and that the district court dismiss any claim that fails to satisfy the requirements of the section. Finally had Congress sought to employ the interpretation advanced by petitioner, it would have employed the *Teague* standard directly rather than including the requirement of action by this Court.

The two courts to address the retroactivity of *Cage v. Louisiana*, 498 U.S. 39 (1990) prior to this Court's decision in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), determined that *Cage* did not satisfy the second *Teague* exception because *Cage* did not alter the elements essential to the fairness of a proceeding and was not a watershed rule of criminal procedure. They were correct. *Cage* provides an additional measure of protection to an existing guarantee of due process protection- against fundamental unfairness and is therefore not a watershed case.

ARGUMENT

I. THE PLAIN LANGUAGE OF 28 U.S.C. § 2244(b)(2)(A) REQUIRES THAT THIS COURT SPECIFICALLY DECLARE THE COLLATERAL AVAILABILITY OF NEW RULES OF CONSTITUTIONAL LAW.

The issue of whether 28 U.S.C. § 2244(b)(2)(A) requires a specific declaration as to the collateral availability of new rules of constitutional law by this court or whether the statute can be fairly read to include the ability of federal courts to assess the availability of the

new rule on their own (by applying a traditional *Teague* analysis) has been raised on numerous occasions. In *In re Smith*, 142 F.3d 832 (5th Cir. 1998), an inmate serving a life sentence for second degree murder sought to file a successive petition raising a *Cage* claim. The Fifth Circuit held that while *Cage* constituted "a new rule of constitutional law", the Supreme Court had not itself made *Cage* retroactive to cases on collateral review, as required by 2244(b)(2)(A). *See also Brown v. Lensing*, 171 F.3d 1031 (5th Cir. 1999) (although Court of Appeals had granted permission to file a successive petition, district court properly dismissed petition since Brown failed to identify any decision by the Supreme Court authorizing collateral review of his *Cage* claim).

In *In re Hill*, 113 F.3d 181 (11th Cir. 1997), a death row inmate sought to file a successive habeas petition, claiming that his *Cage* claim was exempt from the successive petition bar because it relied upon a new, retroactively applicable rule of constitutional law under 28 U.S.C. § 2244(b)(2)(A). The Court held that even though the Eleventh Circuit had previously held[1] that *Cage* should properly be retroactively applied to cases on collateral review, that conclusion did not justify review of a successive habeas action: "Hill's *Cage* claim [did] not satisfy the requirement that any new rule of constitutional law relied upon must have been 'made retroactive to cases on collateral review **by the Supreme Court**,' " since the United States Supreme Court had never so ruled. *Id.*, at 184 (emphasis in original).

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[1] *Nutter v. White*, 39 F.3d 1154, 1157-58 (11th Cir. 1994).

Similarly, in *Rodriguez v. Superintendent, Bay State Correctional Center*, 139 F.3d 270 (1st Cir. 1998), an inmate serving a life sentence for first degree murder sought to file a successive habeas petition raising a *Cage* claim. The First Circuit held that while *Cage* did indeed amount to "a new rule of constitutional law" that was "previously unavailable" to Rodriguez, the *Cage* rule had not been "made retroactive to cases on collateral review by the Supreme Court," within the meaning of 28 U.S.C. § 2244(b)(2)(A). The Court concluded that the plain language of the statute requires "an application to file a second or successive habeas petition [to] point to a Supreme Court decision that either expressly declares the collateral availability of the rule (such as by holding or stating that the particular rule upon which the petitioner seeks to rely is retroactively available on collateral review) or applies the rule in a collateral proceeding." *Id.* at 275. Since Rodriguez was unable to identify a Supreme Court decision rendering *Cage* retroactive to cases on collateral review, the Court rejected his application to file a successive petition.

The various circuit courts to have considered the issue had been in uniformity until the Third Circuit's decision in *West v. Vaughn*, 204 F.3d 53 (3d Cir. 2000) where the court concluded that while the statute encompasses direct retroactive application it further includes alternative methods through which this Court could cause a rule to become retroactive. *Id.* at 58. Specifically, the court concluded "that precedent that makes clear that a new constitutional rule that fits the Teague retroactivity exception suffices to make a rule retroactive for purposes of successive habeas petitions under AEDPA." *Id.* at 61.

To the extent that the intent of "made retroactive by the Supreme Court" is not self evident,[2] other elements of § 2244, specifically sections 2244(b)(3)(A), which requires that a petitioner first move for an order in the court of appeals authorizing the filing of a second or succesive petition in the district court, and subsection (b)(3)(D) which provides that the court of appeals shall grant or deny the motion within thirty days, indicate that the

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[2] *Brown v. Lensing*, 171 F.3d at 1032, quoting *In re Smith*, 142 F.3d at 835 ("the plain language of the statute requires an applicant to 'point to a Supreme Court decision that either expressly declares the collateral availability of the rule . . . or applies the rule in a collateral proceeding' "); *Rodriguez v. Superintendant, Bay State Correctional Center*, 139 F.3d at 274-275 ("Insofar as second or successive petitions are concerned, the statute's precedent-limiting provision, fairly read, eliminates the lower federal courts' role in deeming new rules of constitutional law a permissible basis for habeas relief"); *In re Hill*, 113 F.3d at 184 (to proceed under the § 2244(b)(2)(A) exception to the bar against successive petitions, applicant must establish that the Supreme Court has made the new rule of constitutional law retroactively applicable to cases on collateral review); *Bennett v. United States*, 119 F.3d 470, 471 (7th Cir. 1997) ("only when a decision has been specifically declared retroactive by the Supreme Court may it be used as the basis for a successive motion for habeas corpus"); *In re Vial*, 115 F.3d 1192, 1196-97 (4th Cir. 1997) (en banc) (rejecting argument that phrase "made retroactive to cases on collateral review by the Supreme Court" encompasses those situations in which Supreme Court precedent establishes that the new rule is of the type available to those proceeding on collateral review; "a new rule of constitutional law has been 'made retroactive to cases on collateral review by the Supreme Court' within the meaning of § 2255 only when the Supreme Court declares the collateral availability of the rule in question, either by explicitly so stating or by applying the rule in a collateral proceeding).

approach adopted by the Third Circuit was not anticipated by Congress. Under this scheme, it does not appear that Congress intended to restrict the federal courts of appeals to making retroactivity determinations under the gun so to speak and without the benefit of briefing by the state.

It is inconsistent with the sections "respect for the finality of criminal judgments" *Calderon v. Thompson*, 523 U.S. 538, 558 (1998), that Congress intended the federal courts of appeals to engage in traditional *Teague* analysis via truncated motion practice on a consistent basis, especially where consistency would be the exception and not the rule. The authorization to file successive petitions could well become a function of the happenstance of the composition of the panel making the determination. Furthermore, the federal district courts would bare the weight of the retroactivity determination by virtue of their own gatekeeping function, see 28 U.S.C. § 2244(b)(4),[3] without the benefit of an opinion and with perhaps no more than an order authorizing the filing.

Additionally, the prima facie showing standard for granting authority to file second and successive petitions is inconsistent with the approach adopted in *West v. Vaughn*. To have courts of appeal conducting traditional *Teague* retroactivity analysis on the standard of a prima facie showing would certainly undermine the purpose of the statute. However, a court of appeal could readily determine whether this Court has or has not determined the retroactivity of a new rule. The dangers of this

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[3] "The movant must get through two gates before the merits of his petition can be considered." *Bennett v. United States*, 119 F.3d 468 (7th Cir. 1997).

approach are evident in *Nevius v. Sumner*, 105 F.3d 453, 462 (9th Cir. 1996) where the court granted permission to file successive petition based on a prima facie showing under § 2244(b)(3)(C), "without intimating any view concerning the merits of Nevius' *Cage* claim, or any view regarding whether he has in fact met the requirements of 28 U.S.C. § 2244(b)." Furthermore, the prima facie showing standard is entirely consistent with § 2244(b)(2)(B)(i)'s exception to successive petitions concerning a previously undiscovered factual predicate, as actual satisfaction of this exception would be especially onerous on the court.

The limitation on the appealability of the denial of a motion to file a successive petition of § 2244(b)(3)(E) is yet another example that Congress intended direct action by the Court. To read the statute in any other fashion would include the possibility that similarly situated prisoners could well be greeted by divergent results depending on a particular circuit's evaluation of existing precedent, without a significant possibility of redress.

Furthermore, it appears the Third Circuit's construction of the statute was unduly influenced by the fact that it saw *Sullivan v. Louisiana* as persuasive authority for the proposition that *Cage* is an exception to the *Teague* bar. "In our view, even though *Sullivan* did not arise in the habeas context, it left no doubt as to how the *Cage* rule fits within retroactivity analysis. . . . We believe that, **in this setting**, *Teague* retroactivity survives AEDPA's enactment, and we hold that the constitutional rule announced by *Cage v. Louisiana* has indeed been 'made retroactive to cases on collateral review' within the meaning of 28 U.S.C. § 2244(b)(2)(A)." *West*, 204 F.3d at 55 (emphasis added). Such is not likely to be the case in the future.

Indeed, had this court decided the standard of review question in *Cage* itself, under the rationale of *West v. Vaughn* a federal appeals court would have been left to apply the *Teague* standard solely on the basis of the original opinion. In such a circumstance, it could not so easily be said that this Court had "made" the new rule retroactive unless that determination formed a part of the ruling. Grammatically, there would be no action to complement the verb. *Teague*, the decision, then becomes the actor in the verb "to make," not this Court. Clearly, the construction of this statute should not be governed by the providence that the standard of review for *Cage* errors was announced separately from the rule itself. Had Congress anticipated such a scheme, clearly, it would have chosen to employ the *Teague* standard directly, rather than dictating an additional requirement of action from this Court.

Furthermore, the providence of *Cage* and *Sullivan* having been decided separately further elucidates the difficulties with the Third Circuit's construction of the statute. Prior to *Sullivan* being rendered, there was uniformity that *Cage* could not be applied retroactively, however, *Sullivan* brought uniformity to the contrary assumption. Furthermore, one could envision a sequence of opinions by this Court whose result would bring an inverted swing of uniformity from retroactivity to non-retroactivity. In either scenario, the process, absent the prevailing safeguard of § 2244(b)(2)(A), would be no less than a disaster to a policy rooted in "respect for criminal judgements." *Calderon, supra*. Accordingly, it is imperative, the importance of which can be elucidated no more clearly than by the current misappliaction of *Teague*

through the monolithic acceptance *Cage* should be applied retroactively, that the prevailing construction of § 2244(b)(2)(A), that only this Court can make new rules retroactive by specific declaration, be maintained.

II. *CAGE V. LOUISIANA* ANNOUNCED A "NEW RULE"

Respondent concurs with petitioner that the rule announced in *Cage v. Louisiana* is a new rule of constitutional law within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989). The issue was one of first impression in *Skelton v. Whitley*, 950 F.2d 1037 (5th Cir. 1992) where the court considered that " 'a case announces a new rule if the result was not **dictated** by precedent existing at the time the defendant's conviction became final,' " and stated, "This is emphatically such a case," *Id.* at 1043, quoting *Teague v. Lane*, 489 U.S. at 301. The Louisiana Supreme Court, addressing the retroactivity of *Cage*, likewise determined that *Cage* announced a new rule. *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292 (La. 1992) In *Adams v. Aiken*, 965 F.2d 1306 (4th Cir. 1992) the court stated, "Whether a trial court's unconstitutional misdescription of the burden of proof in a criminal case violates the Due Process Clause was certainly an open question before *Cage*." The Fifth Circuit's opinion remained unchanged following *Sullivan v. Louisiana*, 508 U.S. 275 (1993), which prompted the court to state, "It is undisputed that Cage announced a new rule of constitutional law." *In re Smith*, 142 F.3d 832, 835 (5th Cir. 1998). Indeed every court to reach the issue has determined that *Cage* announced a new rule. See Brief for Petitioner 13.

III. *CAGE V. LOUISIANA* IS NOT A "WATERSHED RULE" OF CRIMINAL PROCEDURE

Prior to this Court's decision in *Sullivan v. Louisiana*, 508 U.S. 275 (1993) the two circuits that addressed the retroactivity of *Cage v. Louisiana*, 498 U.S. 39 (1990) found that the decision did not fall within the second exception of *Teague v. Lane* for watershed rules of criminal procedure. In *Adams v. Aiken*, 965 F.2d 1306 (4th Cir. 1992) the Fourth Circuit concluded without hesitation that although *Cage* "eliminates confusion and improves the accuracy of the trial, . . . it does not alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding." *Adams, supra* at 1312, citing *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (omitting citation and interior quotation marks). The court stated that these bedrock procedural elements remain the same. "The burden of proof is not changed. *Cage* does not alter the elements, it criticizes their dilution." *Ibid.* Similarly, the Fifth Circuit, in *Skelton v. Whitley*, 950 F.2d at 1045 (1992), the first decision to address the issue following *Cage*, concluded that *Cage* failed to conform to the second *Teague* exception as it was not a watershed case in the vain of *In re Winship*, 397 U.S. 358 (1970) and *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Id.* at 1045.

Both courts' analysis were correct. If there was any doubt following *Teague* that the second exception requires conformity on two levels, it was clearly established in *Sawyer v. Smith*:

> Petitioner contends that the second *Teague* exception should be read to include new rules of capital sentencing that "preserve the accuracy and fairness of capital sentencing judgments." . . . But this test looks only to half of our

definition of the second exception. Acceptance of petitioner's argument would return the second exception to the broad definition that Justice Harlan first proposed in *Desist* but later abandoned in *Mackey* under which new rules that "significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas." *Desist v. United States*, 394 U.S. 244, 262, 89 S.Ct. 1030, 1041, 22 L.Ed.2d 248 (1969). In *Teague*, we modified Justice Harlan's test to combine the accuracy element of the *Desist* test with the *Mackey* limitation of the exception to watershed rules of fundamental fairness. It is thus not enough under *Teague* to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also " 'alter our understanding of the bedrock procedural elements' " essential to the fairness of a proceeding. *Teague*, supra, 489 U.S. at 311, 109 S.Ct. at 1076 (plurality opinion) (quoting *Mackey*, 401 U.S., at 693, 91 S.Ct., at 1180).

497 U.S. at 242.

On remand from this Court to consider their decision in light of *Sullivan*, the Fourth Circuit, in *Adams v. Aiken*, 41 F.3d 175 (4th Cir. 1994), reiterated this Court's emphasis that to qualify under *Teague's* second exception a rule "must not only improve accuracy, but also alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Citing *Sawyer v. Smith*, 497 U.S. at 242 (internal citations and quotation marks omitted), and concluded that because a *Cage* error effected the accuracy of the conviction and that because

the error had been identified as structural error it qualified under the second *Teague* exception. *Id.* at 178-179. However, the court failed to address its previous holding that *Cage* did not alter the bedrock procedural elements essential to the fairness of the proceeding.

Accordingly, the Fourth Circuit's analysis is fundamentally flawed for failing to consider how *Cage* "altered the elements" as it did previously. *Humphrey v. Cain*, 120 F.3d 526, (5th Cir. 1997), *rehearing en banc*, 138 F.3d 552 (5th Cir. 1998), *cert. denied*, 525 U.S. 935 (1998), presents the identical shortfall. There the court acknowledged the Fourth and Eleventh Circuit's[4] analysis and concluded that because a *Cage* error is structural it falls within the ambit of the second *Teague* exception. *Id.* at 529.[5] The court did not consider its previous holding in *Skelton v. Whitley* that it could not classify *Cage* as a "watershed case." 950 F.2d at 1045.

Most recently, the Third Circuit addressed this issue in *West v. Vaughn*, 204 F.3d 53 (3d Cir. 2000) and just as

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[4] *Nutter v. White*, 39 F.3d 1154, 1158 (11th Cir. 1994).

[5] The decision of the Fifth Circuit is somewhat disturbing as the Court appeared to suggest that the AEDPA had supplanted the need for the *Teague* bar. "We need not fear that finding no *Teague* bar to claims such as Humphrey's will spawn scores of new habeas petitions. Prisoners who file petitions after April 24, 1996, must surmount the formidable barriers erected by the Anti-terrorism and Effective Death Penalty Act. Of course, we do not have occasion to measure how high those barriers might be. We note only that the one-year statute of limitations, see 28 U.S.C. § 2244(d) & 2255, the restrictions on successive petitions, see 28 U.S.C. § 2244(b) & 2255, and the heightened standard of review for state prisoners, see 28 U.S.C. § 2254(d)(1), could shut out future petitioners in Humphrey's situation."

in *Adams v. Aiken*, 41 F.3d 175, and *Humphrey v. Cain* the analysis was limited to *Cage's* conformity with *Teague's* fundamental fairness and accuracy requirements. The court did not discuss the requirement that the new rule be a watershed rule. In doing so the court failed to recognize that the fairness requirement must also embody a watershed rule as this Court explicity provided in *Teague*. "The second exception suggested by Justice Harlan – that a new rule should be applied retroactively if it requires the observance of those procedures that . . . are implicit in the concept of ordered liberty, **we apply with a modification**. The language used by Justice Harlan in *Mackey*[6] leaves no doubt that he meant the second exception to be reserved for watershed rules of criminal procedure." 489 U.S. 288, 310 (internal citations and quotations omitted, emphasis added).

The Second Circuit in *Gaines v. Kelly*, 202 F.3d 598 (2nd Cir. 2000) acknowledged the two components of *Teague*, and, after assessing the accuracy requirement, the

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[6] "Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing. However, in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction. For example, such, in my view, is the case with the right to counsel at trial now held a necessary condition precedent to any conviction for a serious crime." *Teague v. Lane*, 489 U.S. 288, 310, quoting *Mackey v. United States*, 401 U.S. 667, 693-694, (1971).

court confronted the requirement of a new watershed rule. The court's analysis focused on a comparison of the nature of *Cage* and the right to counsel saying, "The right to accuracy in instructions defining reasonable doubt resembles the right to counsel in that both rights are fundamental to the fairness of a criminal proceeding." *Gaines, supra* at 604. Further, that "Because any criminal conviction rendered pursuant to an unconstitutional definition of reasonable doubt is necessarily unfair, see *Teague*, 489 U.S. at 315, 109 S.Ct 1060, we conclude that the rule advanced by Gaines falls within the second exception to the *Teague* doctrine." *Id.* at 605. That *Cage* invokes the fairness requirement does not of itself provide a basis for concluding that *Cage* is a watershed rule. The *Gaines* court did not identify a shift or new component to basic due process.

Additionally, it does not appear that the court's selection of the right to counsel as a point of comparison was not without purpose as this Court has used *Gideon v. Wainwright*, 372 U.S. 335 (1963) as the paradigmatic example of a watershed rule. See *Saffle v. Parks*, 494 U.S. 484, 495 (1990). However, the comparison of *Cage* to *Gideon* does serve to highlight the fact that *Cage* is without watershed status. *Gideon* overruled *Bets v. Brady*, 316 U.S. 455 (1942) and held that the right to counsel was one of the fundamental rights essential to a fair trial and therefore obligatory upon the States by the Fourteenth Amendment. This clear break from the past and redefinition of ordered liberty is why *Gideon* stands as the paradigmatic example of a watershed rule. The Second Circuit's inability to place *Cage* in some form of historical context to rival *Gideon* further demonstrates that *Cage* is

not a watershed rule. Essentially, our society's concept of due process was not redefined by *Cage*, as it was in *Gideon*.

In *Nutter v. White*, 39 F.3d 1154, (1994) the Eleventh Circuit weighed in on the possible retroactivity of *Cage*[7] and, after concluding that *Cage* satisfied the requirement that the new rule relate to the accuracy of the conviction, concluded that *Cage* should be applied retroactively because "together with *Sullivan*, *Cage* has reshaped our view of the importance of precise reasonable doubt instructions." *Id.* at 1158. By its own terms, the court's realization that *Sullivan* clarified the nature of a preexisting right was an acknowledgment that *Cage* did not establish a new fundamental right. The court's analysis confirms that *Cage* does not qualify as a watershed rule.

That *Cage* does not fall within the second *Teague* exception is made abundantly clear in *Sawyer v. Smith*. In *Sawyer*, the petitioner sought retroactive application of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The new rule established in *Caldwell* was that misleading comments by a prosecutor in the penalty phase, which diminish the jury's sense of responsibility (the last word argument), created an unacceptable risk which could affect the reliability of the sentence and therefore violate the Eighth Amendment. The rule was an extension of the prohibition against prosecutorial argument that renders the sentencing trial fundamentally unfair established in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). Although the rule in

[7] The decision served as the leading basis for the Tenth Circuit's conclusion in *Tillman v. Cook*, 215 F.3d 1116 (10th Cir. 2000) that *Cage* should be applied retroactively.

Caldwell was rooted in fundamental fairness and accuracy, this Court concluded that *Caldwell* failed to qualify under *Teague's* second exception as the rule was an addition to an underlying due process protection. *Cage* like *Caldwell* creates an "addititional measure of protection" above "an existing guarantee of due process protection against fundamental unfairness," *Sawyer v. Smith*, 497 U.S. at 243, the beyond a reasonable doubt standard of *In re Winship*. Both cases respond to an "unacceptable risk" that an underlying due process right has been violated and provide "a protection of systemic value." *Ibid.* For the same reasons *Caldwell* does not fit within *Teague's* second exception, *Cage* should not be applied retroactively. Neither petitioner nor any circuit court has identified a new component of basic due process to emerge from either *Cage* or *Sullivan*. *Cage* is not a "watershed rule" of criminal procedure.

CONCLUSION

The decision of the court of appeals should be affirmed.

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(8)

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IN THE

Supreme Court of the United States

MELVIN TYLER,

Petitioner,

v.

BURL CAIN, WARDEN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INTRODUCTION

In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court held that when a criminal defendant is convicted following a reasonable-doubt instruction that is erroneous under *Cage v. Louisiana*, 498 U.S. 39 (1990), he has been deprived not only of a procedural guarantee "without which a criminal trial cannot reliably serve its function," 508 U.S. at 281, but also of one of the bedrock elements fundamental to the fairness of a criminal trial in our system of justice: "the right to have the jury, rather than the judge, make the requisite finding of 'guilty.'" *Id.* at 278. Before *Cage* and *Sullivan*, this Court had never ruled that a defective reasonable doubt instruction violates the Constitution at all, let alone that it is an error so fundamental that it "vitiates *all* the jury's findings." 508 U.S. at 281. *Cage*, as explained in *Sullivan*, thus truly "alter[ed] our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." *Teague v. Lane*, 489 U.S. 288, 311 (1989). *Cage* error is also "central to an accurate determination of innocence or guilt," *id.* at 313, because, as *Sullivan* explained, where there is *Cage* error there has been no determination of innocence or guilt at all. 508 U.S. at 279-81. As every court of appeals to consider the question since *Sullivan* has agreed, *Cage* thus satisfies the stringent criteria for retroactive application under the so-called "second *Teague* exception." It necessarily either has been made or should now be made retroactive; and in either case, the decision below must be reversed.

Respondent and the amici curiae that have filed briefs supporting the state seek to avoid this result largely by erecting and attempting to demolish straw men. In particular, they argue strenuously that not every error that is "structural," and thus immune from harmless-error review, necessarily satisfies the second *Teague* exception. That may or may not be so, but it is not determinative here. The issue in this case is whether the *reasons* given by this Court in *Sullivan* for its

holding that a violation of this *particular* rule constitutes structural error also lead to the conclusion that *Cage* satisfies the second *Teague* exception. Neither respondent nor any supporting amicus is willing to come to grips with what this Court said in *Sullivan*, for the simple reason that the Court's reasoning in that case compels the conclusion that *Cage* satisfies the *Teague* criteria. Whether the same is true of all other structural errors is largely irrelevant.

ARGUMENT

Because so much of the argumentation of respondent and the amici is directed at arguments *not* relied upon by petitioner Tyler, we begin by making clear what arguments are not necessary to our position in this case. Our position does not depend on the argument that all new rules that *should* be retroactive under a correct application of *Teague* have necessarily been "made retroactive" by this Court.[1] We also do not argue that this Court's order granting certiorari, vacating and remanding in *Adams v. Evatt*, 511 U.S. 1001 (1994), was a substantive holding that itself "made" *Cage* retroactive. And it is not necessary to our position to assert that all structural errors necessarily satisfy the criteria for retroactivity under the second *Teague* exception. To the extent that respondent and the amici devote themselves to refuting these arguments, they are taking on issues not actually presented by this case.

Petitioner's position, rather, is that this Court may at least in some circumstances "make" a new rule retroactive without expressly so holding, when the import of its rulings plainly dictates retroactivity. Here, the ruling in *Sullivan* requires

[1] Such an argument is possible under the statute, and the reasons for it have recently been cogently advanced in *Flowers v. Walter*, No. 99-35552 (9th Cir. Feb. 9, 2001). This Court need not, however, adopt that holding to rule that in this case, where the holding of *Sullivan* so strongly compels a finding of retroactivity, *Cage* has been "made retroactive" within the meaning of the AEDPA.

that result—not because all structural errors must satisfy the second *Teague* exception, but because the specific reasoning used by the Court in *Sullivan* to reach the conclusion that *Cage* error is structural also demonstrates how *Cage* satisfies the *Teague* exception. The Court's grant-vacate-and-remand order in *Adams* does not, of course, "hold" that *Cage* is retroactive, but it does establish that five members of the Court concluded that there was a "reasonable probability" that *Sullivan*'s structural error holding would lead the Fourth Circuit to reconsider its view of retroactivity (*see Lawrence v. Chater*, 516 U.S. 163, 167 (1996)), demonstrating that the structural error issue and the retroactivity issue are not, as respondent and the amici suggest, entirely unrelated. As significant as the Court's action in *Adams* is the unanimous response to *Sullivan* by the courts of appeals, which have clearly recognized the relationship between *Sullivan*'s reasoning and the *Teague* criteria. Understood correctly, what *Sullivan* says about *Cage* requires one of two conclusions in this case: either this Court has already made *Cage* retroactive, or it now should. Either way, reversal and remand is necessary.[2]

[2] Amicus curiae the Criminal Justice Legal Foundation suggests that, instead of reaching either of the questions presented (which are whether this Court has made *Cage* retroactive under 28 U.S.C. § 2244(b)(2)(A) and, if not, whether it should do so), this Court should affirm on the alternative ground that the *Cage* claim was not "previously unavailable" within the meaning of § 2244(b)(2)(A). This issue was not raised in or decided by either court below, and has not been briefed by the parties (nor, indeed, any of the other amici). Contrary to the CJLF's suggestion, this argument is in no way "subsumed" within the questions presented. If, as the CJLF contends, "previously unavailable" should be interpreted to mean something more than that a rule is new, then whether a claim was "previously unavailable" clearly would depend on the application of legal principles and facts different from those on which the questions presented hinge (as the CJLF's own brief demonstrates). *Cf. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991) (holding that the question of enforceability under the FAA of arbitration clauses in

I. *CAGE* WAS "MADE RETROACTIVE" BY *SULLIVAN*

The question whether a new rule can be "made retroactive to cases on collateral review by the Supreme Court" without a direct holding on retroactivity by this Court is of significant importance to the administration of the AEDPA, but it is largely theoretical as far as this particular case is concerned. If, as we argue, the reasoning of *Sullivan* dictates the conclusion that *Cage* must be retroactive in habeas corpus proceedings, the outcome of this case will be the same regardless of how the Court resolves the statutory issue of whether 28 U.S.C. § 2244(b)(2)(A) requires a direct retroactivity holding by the Supreme Court. In other words,

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employment agreements was not subsumed in the issue of whether employment discrimination claims were arbitrable). Because the CJLF's suggested alternative ground for affirmance would avoid the questions presented on a basis not raised by respondent in its brief in opposition, it should not be belatedly raised in the merits briefs (let alone an amicus brief). S. Ct. R. 15.2. As this Court has explained, because the "decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of the questions presented in the petition," asserted nonjurisdictional reasons for not reaching those questions "should be brought to [the Court's] attention *no later* than in respondent's brief in opposition to the petition for certiorari. . . ." *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985); *see also Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992); *Lockhart v. Fretwell*, 506 U.S. 364, 371 n.4 (1993). In any event, the CJLF's argument is without merit. First, it is in essence an argument that petitioner Tyler procedurally defaulted the claim in his first habeas petition, but the state has never raised a procedural default defense. *Cf. Estelle v. Smith*, 451 U.S. 454, 468 n.12 (1981). Second, at the time of petitioner's first habeas petition, the most recent decision of the Louisiana Supreme Court (the denial of rehearing in *State v. Taylor*, 410 So.2d 224 (La. 1982)), foreclosed the claim; there was no support for a constitutional claim based on the instruction in Fifth Circuit case law; and virtually none in any federal case law. The case is thus wholly unlike *Engle v. Isaac*, 456 U.S. 107 (1982), where a plethora of lower-court case law supported the claim at the time the petitioner defaulted. *See id.* at 131-33.

if we are right about the implications of *Sullivan*'s reasoning, then even if *Sullivan* has not already "made" *Cage* retroactive, this Court should now "make" it retroactive in this case. Section 2244(b)(2)(A) will then no longer bar relief to Tyler on remand, as *Cage* will have been "made retroactive . . . by the Supreme Court" under any construction of that language.[3]

With that said, however, it remains our position that the statutory language supports the construction adopted by the Third Circuit in *West v. Vaughn*, 204 F.3d 53 (3d Cir. 2000), which recognizes that this Court can, at least in some circumstances, "make" something happen—that is, cause it to occur or bring it about—without a direct holding to that effect. Conventional definitions of the word "make" certainly permit this result, and neither respondent nor any amicus cites any authority for a more restrictive definition of the word "make."[4] Nor do they cite any legislative history that

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[3] As amicus curiae the Criminal Justice Legal Foundation puts it in its brief, *Cage* "could be [made retroactive] in this case, if it really did meet the criteria for retroactivity. . . . Nothing in the language of the statute precludes this Court from making a rule retroactive in a successive petition case and reversing a court of appeals' decision, even if that decision was correct when rendered, *i.e.*, the rule had not then been made retroactive." CJLF Br. 18. This is one point on which we are in full agreement with the CJLF, and neither respondent nor any of the other amici argues to the contrary.

[4] The Justice Department's amicus brief does not contest that conventional definitions of the word "make," on their face, encompass forms of causation more attenuated than direct and explicit compulsion, but contends that the usage *examples* contained in various dictionaries are more limited. The United States cites no authority for the approach of relying on usage examples to limit otherwise clear dictionary definitions, but in any event, whatever examples may have been chosen by the dictionaries' editors, it is easy to come up with other examples that are consistent with the construction offered by the Third Circuit in *West*. One need go no further than the words of the song: "You made me love you . . . ." It is doubtful that anyone listening to those words ever imagined

addresses the meaning of this particular provision and requires a narrower construction.

Instead, respondent and the amici argue principally that the *West* construction renders the words "by the Supreme Court" superfluous. That argument, however, misses the real issue, which is not *whether* some action must be taken "by the Supreme Court," but *what* action must be taken. The *West* construction of the statute does not have the effect of deleting the words "by the Supreme Court." It is still necessary that the Supreme Court must have done something to make a new rule retroactive; the point is simply that that action may take the form of something other than an express holding of retroactivity. Thus, the words "by the Supreme Court" still retain significant meaning. For example, if a court of appeals were to issue its own new rule, and then hold that the new rule satisfied the second *Teague* exception, it could be said that the new rule had been "made retroactive," but certainly not that it had been "made retroactive by the Supreme Court," since the Supreme Court would had done *nothing* to bring about the retroactive application of that particular rule. Thus, the words "by the Supreme Court" are not rendered mere surplusage by our proposed construction.

Ironically, even while arguing strenuously that our construction of the statute reads the words "by the Supreme Court" out of the law, the United States Justice Department, in its amicus brief, itself proposes a construction of the AEDPA under which those words are meaningless. The Justice Department contends that the AEDPA's one-year statute of limitations, which runs from the date of a Supreme Court decision announcing a new rule if that new rule has been "made retroactively applicable to cases on collateral review," should be interpreted (for policy reasons) to require a direct retroactivity holding by this Court, even though this

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that they meant that the subject of the song had explicitly ordered the singer to love him.

provision *omits* the words "by the Supreme Court" following "made retroactively applicable to cases on collateral review."[5] U.S. Br. 15, n.7. Thus, the United States asserts that the statutory phrase "made retroactively applicable" should be interpreted to mean the same thing *regardless* of whether it is followed by the words "by the Supreme Court." In short, it is the United States that advances the construction that renders those words superfluous, not petitioner. Apparently, the view of the United States is that the different placement of the phrase "by the Supreme Court" in the two otherwise similar provisions is simply a slip of the draftsman's pen.[6] The federal government's position underscores that interpreting the

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[5] The AEDPA's statute of limitations provisions are found in 28 U.S.C. § 2244(d)(1) (applicable to collateral review proceedings involving state prisoners) and 28 U.S.C. § 2255 (applicable to federal prisoners). The relevant subparts of both provisions end with the same phrase ("made retroactively applicable to cases on collateral review") without adding "by the Supreme Court."

[6] Moreover, contrary to the Justice Department's assertion that our interpretation of the statute poses practical problems with respect to the statute of limitations provisions, it is actually the government's construction that would render the statute of limitations totally unworkable. The language of the statute states that when a new decision of this Court is "made retroactive," the one-year limitations period for filing petitions under §§ 2254 and 2255 runs *not* from the date the decision is "made retroactive," but from "the date on which the constitutional right asserted was *initially recognized* by the Supreme Court." 28 U.S.C. § 2244(d)(1)(C) (emphasis added); *see also* 28 U.S.C. § 2255 (same language except for omission of the word "constitutional" before "right"). If, as the government argues, an express decision of this Court is necessary to "make" such a new decision retroactive, and if, as usually happens, it takes more than a year for the retroactivity issue to reach and be decided by this Court (*e.g., Bousley v. United States*, 523 U.S. 614 (1998) (deciding retroactivity issue three years after initial decision)), then the limitations period (measured from the decision initially recognizing the right) will have expired before anyone knows that it has begun to run. Thus, the limitations provision only makes sense if the lower courts have the ability to recognize that a decision has been "made retroactive" without an express holding by this Court.

statute is not quite as straightforward as respondent and the amici would like to suggest, and bears out this Court's statement in *Lindh v. Murphy* that the AEDPA is not a model of statutory draftsmanship. 521 U.S. 320, 336 (1997).[7]

Respondent and the amici also stumble over the argument that, under *Bousley v. United States*, 523 U.S. 614 (1998), this Court undoubtedly "makes" certain of its decisions retroactive merely by announcing them. Neither respondent nor the amici can deny this point. Rather, they seek to minimize its significance by arguing that such decisions are rare, and since most of them involve questions of federal statutory interpretation, § 2244(b)(2)(A) and the parallel provision in § 2255, which only permit successive petitions raising new rules of *constitutional* law, do not apply to them anyway.

This answer, however, is deeply flawed. *First*, it evades the principal point of the example, which is that there clearly are circumstances in which this Court can "make" a rule retroactive without a direct holding to that effect. This in itself defeats the "plain meaning" argument on which respondent and the amici rely. *Second*, the argument overlooks that *Bousley*'s "automatic" retroactivity point also applies to constitutional holdings that place a defendant's conduct outside the reach of a criminal statute, such as *United States v. Eichman*, 496 U.S. 310 (1990), and *United States v. Lopez*, 514 U.S. 549 (1995).[8] Under the construction of the statute

[7] Further adding to the confusion is the position of another amicus, the CJLF, which argues that the omission of "by the Supreme Court" in the statute of limitations provision means that Congress clearly did *not* intend the statute of limitations provision and the successor petition provision to receive the same interpretation. CJLF Br. 12.

[8] As *Lopez* demonstrates, one need not go back decades to find examples of such constitutional "new rules" issued by this Court, as the CJLF contends. CJLF Br. 15-16. Other recent examples of constitutional "new rules" affecting both state and federal prisoners that would appear to qualify for automatic retroactivity under *Bousley* but require a separate

proposed by respondent and the amici, this Court would have to go through the useless exercise of addressing the retroactivity of such decisions before they could be raised in successive petitions under the AEDPA. *Third*, even as to purely statutory questions of federal law, the construction of the AEDPA offered by the United States as amicus curiae would require a separate retroactivity holding by this Court under the "made retroactively applicable" prong of the AEDPA statute of limitations in § 2255, which the government contends should be construed identically to the successive petition provision.[9]

Finally, respondent and the amici offer a variety of policy reasons to support their proposed construction of the statute. None is persuasive. First, respondent and the amici stress that the purpose of the AEDPA is to prevent abusive successive petitions and the "affront" to finality and federalism that they present. But the statute also reflects an express recognition that when a new rule of constitutional law clearly warrants

retroactivity holding to support a successive petition under respondent's construction of the AEDPA include *City of Chicago v. Morales*, 527 U.S. 41 (1999), *Carmell v. Texas*, 529 U.S. 513 (2000), and *United States v. Hubbell*, 530 U.S. 27 (2000).

[9] In addition, the government's construction would pose an anomaly for federal prisoners seeking to file successive petitions to take advantage of the automatically retroactive application of substantive decisions of federal criminal law such as *Bailey v. United States*, 516 U.S. 137 (1995). The United States contends that because such decisions are not new decisions of "constitutional law," they are not governed by the successive petition provision in § 2255 (which contains language identical to § 2244(b)(2)(A)); thus, successive relief may be obtained on the basis of such decisions only through a habeas corpus petition under 28 U.S.C. § 2241, which is available in such circumstances because the § 2255 remedy is "ineffective." *See Triestman v. United States*, 124 F.3d 361 (2d Cir. 1997); U.S. Br. 20-21 & n.9. But petitions by federal prisoners under § 2241 remain subject to the successive petition provisions of § 2255 by virtue of 28 U.S.C. § 2244(a), which thus, once again, imposes on such prisoners the problem of establishing that a new decision has been made retroactively applicable "by the Supreme Court."

retroactive application, these considerations are outweighed. A successive petition relying on such a rule is not abusive, and it is no more an "affront" to considerations of finality for a successive petition to be entertained when the courts of appeals unanimously agree that the clear import of this Court's decisions is that a particular ruling must be retroactive than for the petition to be entertained when this Court has expressly stated that the ruling is retroactive.

Second, respondent and the amici contend that our proposed construction of § 2244(b)(2)(A) would complicate the "gatekeeping" function of the courts of appeals under § 2244(b)(3) by forcing them to consider complex issues of retroactivity in the limited time permitted them for deciding whether to permit filing of a successive application. This argument, however, overlooks that the courts of appeals do not make final determinations at the "gatekeeping" stage as to whether a successive petition is permitted under § 2244(b)(2); rather, they determine only whether the applicant has made a "prima facie showing" of entitlement to proceed, which is subject to plenary consideration by the district court once the application is filed, and again on appeal from the district court's final disposition of the application. There is no reason to think that the courts of appeals will be incapable of quickly and economically making speedy "gatekeeping" determinations of whether this Court's decisions clearly require retroactivity of particular new rulings, subject to later, full consideration on the merits.[10]

Third, respondent and the amici seek to minimize the practical difficulties posed by their own construction of the statute by arguing that in those few cases where a new rule should be retroactive, it is appropriate to impose on this Court

[10] Indeed, that is what happened in this case: the Fifth Circuit permitted the filing of the application at the gatekeeping stage, and then gave plenary consideration to the issue after the petition had been filed and disposed of by the district court.

the burden of deciding the retroactivity issue so that meritorious successive petitions will be able to proceed. The United States submits, for example, that even where there is no conflict among the circuits, the retroactivity issue in such cases will, in light of the significance the AEDPA places on a decision of that issue "by the Supreme Court," qualify for review by this Court under Rule 10(c) as an "important question of federal law that has not been, but should be, settled by this Court." U.S. Br. 21; *see also* CJLF Br. 16-18. It may well be that, if respondent's construction of the AEDPA prevails, this Court will alter its normal standards of review to take cases (like this one) where the unanimity of the lower courts on retroactivity would normally make review of the issue by this Court unnecessary. The question, however, is whether it should have to. It is no small matter to impose even a small number of needless decisions on this Court. A construction of the statute that does so poses at least as much of an "affront" to principles of judicial economy (which the AEDPA is also intended to serve) as our proposed construction poses to the principle of "finality." Given that the statute can easily be read to avoid this result, the possibility that respondent's construction of the statute would result in even a relatively small number of cases needlessly reaching this Court is a significant reason not to adopt that construction.[11]

[11] Amicus curiae CJLF bases its disagreement with this point in part on its "belief" that there are *no* cases that will ever qualify for retroactivity under *Teague*'s second exception. CJLF Br. 16. If that were the case, then the adverse consequences of respondent's interpretation of the AEDPA would indeed be less severe. But we cannot believe that this Court would bother itself with addressing cases where the "precise contours" of the second *Teague* exception are "difficult to discern" (*Saffle v. Parks*, 494 U.S. 484, 495 (1990)) if those "contours" in fact encompassed only a null set.

II. *SULLIVAN*'S REASONING REQUIRES THAT *CAGE* BE APPLIED RETROACTIVELY IN CASES ON COLLATERAL REVIEW

Neither respondent nor any amicus contests the obvious proposition that the *Cage* rule satisfies the first of the two criteria a rule must meet in order to qualify for the second *Teague* exception: that is, the rule is "central to an accurate determination of innocence or guilt" and establishes "procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 313. The centrality to the guilt-innocence decision of an instruction that tells the jury how to make that decision could hardly be disputed, even if *Sullivan* had not made abundantly clear that when *Cage* error has been committed, there cannot possibly be an "accurate conviction." *See Nutter v. White*, 39 F.3d 1154, 1157 (11th Cir. 1994).

Respondent and the amici concentrate their fire on the proposition that *Cage* satisfies the second prong of *Teague*'s second exception—*i.e.*, that it "implicate[s] the fundamental fairness of the trial" and "alters our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." *Teague*, 489 U.S. at 312 (internal quotation marks omitted). According to respondent and the amici, *Sullivan* does not establish that *Cage* satisfies this standard, because the inquiry into "structural error" performed by *Sullivan* is entirely unrelated to the fundamental fairness/bedrock elements strand of *Teague*.[12]

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[12] Respondent even goes so far as to accuse the federal courts of appeals that have unanimously held that *Sullivan* implies that *Cage* must be retroactive of "ignoring" the bedrock fairness prong of the *Teague* test. Any reading of the opinions demonstrates that this is a significant distortion of their holdings. *See, e.g., Adams v. Aiken*, 41 F.3d 175, 178 (4th Cir. 1994) ("Without a jury's constitutional finding of guilt, a conviction lacks both 'accuracy' and one of the '*bedrock procedural elements* essential to the fairness of the proceeding.'").

In this regard, respondent and the amici devote much space to arguing that not all new rules whose violation is structural error necessarily also satisfy *Teague*'s second exception. In so doing, they attack an argument on which our position does not depend. Even in assailing what is essentially a straw man, however, respondent and the amici are forced to mischaracterize the structural error test in ways that substantially undermine their position. First, respondent and the amici contend that whether a rule is structural error depends largely on how difficult it is to "determine the effect of the error on the jury's verdict" and has "little to do . . . with whether the new rule is a 'bedrock procedural element[].'" U.S. Br. 26. Second, they assert that the Court's test for structural error is designed to sweep in a considerably larger number of cases than the very few that qualify for *Teague*'s second exception.

Both propositions would require this Court simply to ignore how it has defined the "structural error" test. In *Arizona v. Fulminante*, the Court made clear that whether an error is structural is not simply a matter of how easy or difficult it is to assess its effect on the outcome; rather, an error is structural only if it deprives the defendant of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." 499 U.S. 279, 310 (1991) (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)); *see also Neder v. United States*, 527 U.S. 1, 8-9 (1999) (same). *Fulminante* and *Neder*—whose analysis respondent and the amici are unwilling to address—establish that, far from having "little to do" with whether a rule is a bedrock procedural element of fairness, structural error in fact has *everything* to do with fundamental fairness.

The notion that structural errors are a dime a dozen while retroactive rules are a critically endangered if not outright extinct species is also misguided. This Court emphasized in *Fulminante* as well as in *Neder* that the class of errors that are

immune from harmless error review is an extremely narrow one. *See* 499 U.S. at 306; 527 U.S. at 8. The reason is similar to the reason that few rules are retroactively applicable on collateral review: only rarely is a right so critical to the fairness of a proceeding that its denial justifies overturning the finality of a jury's verdict without regard to whether the error had a perceptible impact on the result. This Court has recognized barely a handful of rules—six to be exact—that fall in this category. *Id.*[13]

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[13] The amicus brief filed by various state attorneys general asserts, erroneously, that the lower courts, in contrast to this Court, have been profligate in their recognition of new structural errors, and have elevated 29 deprivations to that status. State AG Br. 11 & n.2. The states raise the specter that these same courts, if unleashed by a ruling adverse to the state in this case, could hold all these rules retroactively applicable in collateral proceedings. Of course, if the *lower* courts have erred in recognizing too many "structural errors," the proper remedy is to rein in those decisions, not to counterbalance by being excessively stringent in applying the *Teague* retroactivity test to an error that *this* Court has determined to be structural. In any event, an analysis of the 28 (not 29) cases cited by the states reveals that there is much less here than meets the eye. Of the 28 decisions cited, four mention structural error only in passing or in dissenting opinions; 13 apply prior holdings of this Court regarding structural error to situations that are similar if not identical to those addressed by this Court; seven apply the prior holdings of this Court to situations that are clearly analogous; and three rely upon structural error only as an alternative basis for their holding—that is, they find that the result is the same under a harmless error standard. In fact, in only one of the 28 cases cited, *Harmon v. Marshall*, 69 F.3d 963 (9th Cir. 1995), did a court both find a structural error not previously described by this Court and apply its holding retroactively to a case on collateral review. In *Harmon*, the trial court had failed to give *any* jury instructions at all that defined the elements of two of the offenses with which the defendant was charged. The Ninth Circuit, in a per curiam opinion, found such a total omission to be both structural in light of the reasoning of *Sullivan* and retroactive under *Teague*'s second exception, because of the "wholesale failure to define an offense for the jury," which was "tantamount to telling the jury to 'go in there and do whatever you think is right.'" *Id.* at 967. The Ninth Circuit's sensible resolution of what is probably a sui generis case hardly indicates that the floodgates are about to open.

Moreover, to the extent that there is some difference of substance between the structural error standard and the second *Teague* retroactivity exception, the difference relates primarily to the "reliability" aspect of *Teague*, which not all structural errors are required to satisfy, not the "bedrock fairness" requirement. In other words, if there are structural errors that do not satisfy the criteria of the second *Teague* exception, that is because they do not call into question the reliability of the guilt-innocence determination, not because they do not involve rules essential to fundamental fairness. *See, e.g., Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury is structural error); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of right to self-representation is structural error). A structural error may or may not relate to reliability, but it necessarily calls into question the fundamental fairness of the proceeding. And it is the fundamental fairness prong of *Teague*, not the reliability prong, that respondent and the amici claim that *Cage* fails to satisfy.

Ultimately, the relevant question is not whether structural errors in general satisfy *Teague*'s second exception, but whether this particular one does. The answer is found in *Sullivan*'s analysis of the nature of the *Cage* rule, which respondent and the amici take pains to avoid addressing specifically. *Sullivan* could not have made clearer that it was premised upon the notion that an erroneous reasonable-doubt instruction deprived the defendant of a fundamental right—a determination of guilt based on "'beyond a reasonable doubt' jury findings." 508 U.S. at 285 (Rehnquist, C.J., concurring). The error, the Court stressed, deprived the defendant of a "basic protection"—the "right to trial by jury." *Id.* at 281-82.[14]

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[14] Amicus CJLF observes that the right to trial by jury in noncapital cases announced in *Duncan v. Louisiana*, 391 U.S. 145 (1968), was itself held nonretroactive (both to cases on direct appeal and cases on collateral

Nonetheless, respondent and the amici insist that even if *Cage* "implicate[s] the fundamental fairness of the trial," *Teague*, 489 U.S. at 312, it was still not a "watershed" ruling because it did not "alter our understanding" of bedrock principles of fairness, *id.* at 312, but was only an application of the principle, previously announced in *In re Winship*, 397 U.S. 358 (1970), that the Constitution requires that the standard of proof in a criminal case be "beyond a reasonable doubt."

Winship itself was unquestionably a watershed decision that altered our understanding of the bedrock principles of fairness required by the Constitution in criminal matters. But that does not mean that *Cage* was not. Although *Winship* announced the substantive standard of proof necessary to sustain a criminal conviction, this Court had never held until *Cage* that a reasonable-doubt instruction such as the one at issue here violated the Constitution, nor had it held that any error in *describing* the reasonable-doubt standard was an error of constitutional dimension requiring reversal of a resulting conviction. That is why *Cage* was, as all agree, a "new rule": it did not follow ineluctably from *Winship*, but broke new ground.

Thus, before *Cage*, it was not understood that a misdescription of the reasonable-doubt standard constituted a deprivation of the fundamental right to a jury determination

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review) in *DeStefano v. Woods*, 392 U.S. 631 (1968). But *DeStefano* was decided under the ad hoc balancing approach to retroactivity that this Court rejected in *Teague* and *Griffith v. Kentucky*, 479 U.S. 314 (1987), and its result thus does not dictate the result here under a test that turns on wholly different factors. Moreover, the *DeStefano* Court relied heavily on the proposition that the difference between being tried before a jury and being tried before a judge did not generally affect the accuracy of the guilt-innocence determination. 392 U.S. at 633-34. The same cannot be said of the difference between being tried before a jury under the proper standard of proof and being tried before a jury under an improper standard.

of guilt. And it was certainly not understood before *Cage* that this was an error so fundamental that, as *Sullivan* went on to hold, it "vitiates *all* the jury's findings." *Sullivan*, 508 U.S. at 281. Therefore, the *Cage* rule, as explained by *Sullivan*, necessarily "alter[ed] our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction," as *Teague* requires. *Teague*, 489 U.S. at 312. This (combined with the undisputed accuracy and reliability element) is what defines a "watershed rule" under *Teague*.

Respondent and the amici also seem to argue that *Cage* was not a "watershed decision" because it was not as significant an event in jurisprudential history as what *Teague* described as the archetypal "watershed decision"—*Gideon v. Wainwright*, 372 U.S. 335 (1963). *Cage*, they insist, is no *Gideon v. Wainwright*. To be sure, *Cage* is not the stuff of best-sellers and movies. Not many cases are. But *Teague*'s use of the term "watershed" is not intended to make retroactivity dependent on mere subjective assessments of how celebrated a ruling has become. Rather, it defines "watershed" rulings as those that are essential to the accuracy of the guilt-innocence determination and that alter our understanding of the requirements of bedrock fairness in a criminal proceeding. As *Sullivan* demonstrates, *Cage* meets those criteria precisely, no matter how low its profile may be in the public imagination or the annals of legal history.

Nor can *Cage* be deprived of its watershed status simply because the line between a constitutional violation as exemplified by *Cage* and an acceptable instruction as set forth in *Victor v. Nebraska*, 511 U.S. 1 (1994), is a fine one. The narrow distinction between what is constitutional and unconstitutional does not show that *Cage* represented only "incremental change" and "fine-tuning" (CJLF Br. 26). If anything, the decision that represented "incremental change" and "fine-tuning" was *Victor*, not *Cage*. More broadly, the

distinction at the margins between a constitutional violation and a practice that barely passes muster is always difficult to draw. That does not mean, however, that the decision that first holds that a particular practice can constitute a deprivation of a fundamental constitutional right is not a "watershed" decision.

In the final analysis, all of the arguments against finding that *Cage* satisfies the second *Teague* exception reflect a deep skepticism about whether *any* new decision can qualify under *Teague*. The briefs of respondent and the amici are permeated with the view that only cases decided at least thirty years ago (such as *Gideon*) or principles that have never been "new" at all (such as the rule against use of forced confessions) could possibly be so fundamental that they could satisfy *Teague*. But that is not what *Teague* says, nor does it reflect the views of Justice Harlan in his opinion in *Mackey v. United States*, 401 U.S. 667, 675 (1971), which *Teague* largely adopted. Rather, those decisions set forth principles that govern whether a rule is to be retroactive, and reflect the view that a rule that qualifies under those principles *should* be retroactively applied. And *Sullivan*'s analysis of the *Cage* rule demonstrates that *Cage* does indeed satisfy the *Teague* criteria. Fidelity to the reasoning of *Sullivan* and *Teague* therefore requires that *Cage* apply retroactively, as every federal court to address the issue after *Sullivan* has held.

CONCLUSION

Because *Sullivan*'s reasoning compels retroactivity of *Cage* under the principles of *Teague*, this Court either should now hold that *Cage* has been made retroactive under 28 U.S.C. § 2244(b)(2)(A), or it should make *Cage* retroactive by so holding in this case. In either event, the judgment of the Fifth Circuit should be reversed, and the case remanded for further proceedings in the district court on petitioner Tyler's petition for a writ of habeas corpus.

Respectfully submitted,

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In the Supreme Court of the United States

MELVIN TYLER, PETITIONER

v.

BURL CAIN, WARDEN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether a second or successive petition for a writ of habeas corpus asserting a claim under *Cage* v. *Louisiana*, 498 U.S. 39 (1990) (per curiam), "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," within the meaning of 28 U.S.C. 2244(b)(2)(A) (Supp. IV 1998).

2. Whether *Cage* v. *Louisiana* announced a new rule of constitutional law that should be made retroactive to cases on collateral review.

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In the Supreme Court of the United States

No. 00-5961

MELVIN TYLER, PETITIONER

v.

BURL CAIN, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether a state prisoner's second or successive petition for a writ of habeas corpus asserting a claim under *Cage* v. *Louisiana*, 498 U.S. 39 (1990) (per curiam), satisfies the requirement of 28 U.S.C. 2244(b)(2)(A) that such petitions rely "on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court."[1] An identical statutory provision restricts second or successive motions for post-conviction relief by federal prisoners. See 28 U.S.C. 2255 para. 8(2). Because the Court's ruling will apply to collateral attacks on federal criminal judgments, the

[1] All citations to 28 U.S.C. 2244, 2254, and 2255 in this brief refer to Supp. IV 1998.

United States has a substantial interest in the outcome of this case.

STATEMENT

1. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. I, 110 Stat. 1217, which was signed into law on April 24, 1996, works substantial changes to Chapter 153 of Title 28 of the United States Code, pertaining to collateral review of criminal convictions. See *Felker* v. *Turpin*, 518 U.S. 651, 654 (1996). It places specific restrictions on second or successive habeas applications. In particular, the Act provides that

> [a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless * * * the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. 2244(b)(2)(A). The Act also provides an alternative test that permits a second or successive application for habeas corpus based on newly discovered evidence. 28 U.S.C. 2244(b)(2)(B).

The AEDPA also contains a "gatekeeping" provision. That provision requires that, before a prisoner may file a second or successive application for a writ of habeas corpus in a district court under 28 U.S.C. 2254, the prisoner must "move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. 2244(b)(3)(A). To obtain such authorization, the prisoner must make a "prima facie showing" that his application "satisfies the

requirements," 28 U.S.C. 2244(b)(3)(C), of Section 2244(b)(2).

2. In 1976, petitioner was convicted in Louisiana state court of second degree murder and sentenced to life imprisonment. His conviction was affirmed by the Louisiana Supreme Court. J.A. 4; see *State* v. *Tyler*, 363 So.2d 902 (1978). Petitioner then filed five applications for post-conviction relief in state court, all of which were denied. J.A. 4. Petitioner also filed a federal habeas corpus petition under 28 U.S.C. 2254. The district court denied petitioner federal habeas corpus relief, and the court of appeals affirmed. See Pet. 4.

In 1995, petitioner filed his sixth application in state court for post-conviction relief, claiming that the jury instruction on reasonable doubt that was given at his trial violated *Cage* v. *Louisiana*, 498 U.S. 39 (1990) (per curiam).[2] The state court denied his application, and the Louisiana Supreme Court denied a similar application. J.A. 4-5; see *State ex rel. Tyler* v. *Cain*, 684 So.2d 950 (1996).

3. Petitioner then filed a motion in the court of appeals for authorization to file a second or successive habeas corpus petition in the district court. J.A. 3; see 28 U.S.C. 2244(b)(3)(A). The court of appeals granted the motion, finding that petitioner had "made a prima facie showing that he meets the requirements of § 2244(b)(2)." J.A. 3. The court limited petitioner's successive habeas petition, however, to whether *Cage*

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[2] The text of the reasonable doubt instruction given at petitioner's trial is reproduced in Appendix B to this brief. In *Cage* v. *Louisiana*, this Court held that a similar instruction was unconstitutional because it permitted "a finding of guilt based on a degree of proof below that required by the Due Process Clause." 498 U.S. at 41 (footnote omitted).

should be applied retroactively on collateral review and whether the reasonable doubt instruction at petitioner's trial was unconstitutional under *Cage* and *Victor* v. *Nebraska*, 511 U.S. 1 (1994). J.A. 3.

4. The district court analyzed the case on the assumption that the court of appeals had already determined that petitioner satisfied Section 2244(b)(2)(A). J.A. 4. The district court held that *Cage* should be applied retroactively to petitioner's application for collateral relief, noting that the court of appeals had held that *Cage* applies retroactively to cases on collateral review. J.A. 5-7 (citing *Humphrey* v. *Cain*, 138 F.3d 552 (5th Cir.) (en banc), cert. denied, 525 U.S. 935, 943 (1998)). The court denied petitioner's habeas corpus petition, however, concluding that petitioner could not satisfy the "stringent AEDPA standard," J.A. 12, of 28 U.S.C. 2254(d)(1), which precludes collateral relief on "any claim that was adjudicated on the merits in [s]tate court proceedings" unless the state court's denial of relief "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

5. The court of appeals affirmed the denial of petitioner's habeas corpus petition. J.A. 14-15. The court stated, however, that the district court "erred in not determining first whether [the] petition satisfied AEDPA's successive habeas standard, 28 U.S.C. § 2244(b)(2)(A)." J.A. 15. Citing its decisions in *Brown* v. *Lensing*, 171 F.3d 1031 (5th Cir. 1999), and *In re Smith*, 142 F.3d 832 (5th Cir. 1998), the court held that petitioner's successive petition was barred by Section 2244(b)(2)(A) because he could not show "that any Supreme Court decision renders the *Cage* decision retroactively applicable to cases on collateral review." J.A. 15.

SUMMARY OF ARGUMENT

I. The AEDPA imposes stringent new limitations on the ability of a prisoner to file a second or successive petition for a writ of habeas corpus. A prisoner must, before filing his petition, meet a "gatekeeping" requirement by having the court of appeals certify that his petition meets one of two narrow conditions. See *Felker* v. *Turpin*, 518 U.S. 651, 657 (1996). One of those conditions is that the petition must rely on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. 2244(b)(2)(A). The text of that provision requires that the determination that the new rule is retroactive be made by this Court —not by a lower court applying the principles of retroactivity announced in this Court's opinions.

The conclusion that Section 2244(b)(2)(A) requires a decision of this Court on the retroactivity of a particular new rule is reinforced by this Court's interpretation of an analogous provision of the AEDPA in *Williams* v. *Taylor*, 529 U.S. 362 (2000). In that case, the Court made clear that the phrase "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. 2254(d)(1), "refers to the holdings, as opposed to the dicta, of this Court's decisions," and "restricts the source of clearly established law to this Court's jurisprudence." 529 U.S. at 412. There is no reason to give Section 2244(b)(2)(A) a different interpretation; in both provisions, Congress intended this Court's specific decisions, rather than decisions of the lower courts, to provide the governing rule on the particular point of law at issue.

If Congress had intended to invoke only the "principles" of this Court's retroactivity decisions, as petitioner contends (Br. 9, 21-22), it could have easily used the "application of * * * law" language contained in the provision of the AEDPA at issue in *Williams*, and simply required the lower courts to assess whether a new rule was retroactive to cases on collateral review "*by application of the principles determined* by the Supreme Court." The italicized phrase, however, was not included in the statute. Indeed, on petitioner's interpretation, the statute's reference to "the Supreme Court" is superfluous; even without such a reference, the lower courts would be bound to apply this Court's settled and well-established framework for the analysis of retroactivity questions.

Interpreting the gatekeeping provision to require that this Court has made a decision retroactive before second or successive habeas petitions may be filed is consistent with the purpose of the AEDPA to restrict habeas litigation. The requirement ensures that, unless and until this Court has determined that the new rule is available, lower courts need not adjudicate "new rule" claims in second petitions. It is also consistent with the procedural scheme of the gatekeeping system, which contemplates summary decisions on a short timetable. There is, moreover, nothing anomalous about Congress's requirement that this Court itself determine retroactivity; only a small set of new rules will qualify for retroactive application, and it is sensible to require this Court to make the decision before entitling repetitive habeas filers to seek relief.

In this case, petitioner relies, for his new rule, on the holding of *Cage* v. *Louisiana*, 498 U.S. 39 (1990) (per curiam), that a particular reasonable-doubt instruction was unconstitutional. *Cage* arose on direct review, and

this Court has not made *Cage* retroactive to cases on collateral review. Accordingly, petitioner was not entitled to relief in the courts below.

II. *Cage* should not be made retroactive to cases on collateral review. In a line of cases beginning with *Teague* v. *Lane*, 489 U.S. 288 (1989), this Court has established that new rules of constitutional criminal procedure are not retroactively applicable to cases on collateral review unless they satisfy one of two narrow exceptions. First, a new rule is retroactively applicable if it places primary conduct beyond the reach of the State to prosecute, or establishes a categorical guarantee prohibiting a particular punishment for a class of persons. *Cage* clearly does not satisfy that test; it simply held that a particular reasonable-doubt instruction did not meet constitutional requirements.

The second *Teague* exception is limited to "watershed rules of criminal procedure" that are "central to an accurate determination of innocence or guilt." *Teague* v. *Lane*, 489 U.S. at 311, 313 (plurality opinion). For a rule to fall within *Teague*'s second exception, it must satisfy two requirements: infringement of the new rule must "seriously diminish the likelihood of obtaining an accurate conviction," *id.* at 315, and the new rule must "alter our understanding of the *bedrock procedural elements*" essential to the fairness of a proceeding, *id.* at 311. *Cage* is not such a rule.

This Court's holding in *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), that a *Cage* error is "structural"—*i.e.*, that it requires reversal without a harmless-error inquiry—does not establish that *Cage* is a "watershed" decision. The holding in *Sullivan* indicates that the *Cage* rule serves the goal of obtaining an accurate conviction. But it does not speak to whether the rule

has changed our conception of the fundamental elements of a fair proceeding. And *Cage* did not do so.

The reasonable doubt standard has been established at least since *In re Winship*, 397 U.S. 358 (1970). *Cage* was simply an application of that principle. It did not alter our understanding of a fair trial; it simply refined an existing requirement. If refinements of basic components of a fair trial, such as *Cage*, are considered "watershed" new rules, then many of this Court's constitutional decisions will have to be made retroactive. Such a conclusion would be inconsistent with the Court's recognition in *Teague* and later cases that it is "unlikely that many such components of basic due process have yet to emerge." *Butler* v. *McKellar*, 494 U.S. 407, 416 (1990) (quoting *Teague* v. *Lane*, 489 U.S. at 312 (plurality opinion)).

ARGUMENT

I. SECTION 2244(b)(2)(A) PERMITS A PRISONER TO FILE A SECOND OR SUCCESSIVE HABEAS CORPUS PETITION THAT RELIES ON A NEW RULE OF CONSTITUTIONAL LAW ONLY IF THIS COURT HAS EXPRESSLY MADE THE NEW RULE RETROACTIVE TO CASES ON COLLATERAL REVIEW.

A. The Text Of Section 2244(b)(2)(A) Permits A Second Or Successive Petition Only When This Court—Not A Court Of Appeals Or A District Court—Has Made A New Rule Retroactive To Cases On Collateral Review

1. Section 2244(b)(2)(A) permits a prisoner to file a second or successive petition for a writ of habeas corpus only if the petition relies on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously

unavailable." A "new rule" is "made retroactive * * * by the Supreme Court" only when this Court explicitly states that the new rule is retroactive or applies the new rule to a case on collateral review. The text of Section 2244(b)(2)(A) requires that result. The language is not satisfied, as petitioner contends (Br. 9), by a determination *by the lower courts* making the "new rule" retroactive in light of "the principles of this Court's decisions" (Br. 21-22) in the field of retroactivity.

This Court has adopted general principles for determining the retroactivity of new rules of criminal procedure to cases on collateral review. See *Teague* v. *Lane*, 489 U.S. 299 (1989); see also *Graham* v. *Collins*, 506 U.S. 461 (1993); *Saffle* v. *Parks*, 494 U.S. 484 (1990); *Butler* v. *McKellar*, 494 U.S. 407 (1990); *Penry* v. *Lynaugh*, 492 U.S. 302, 313-314 (1989). But the AEDPA does not refer to such "principles." Rather, Congress specifically designated this Court as decisionmaker on the issue of retroactivity. Thus, as the Eleventh Circuit has explained, "[i]t is not enough that the new rule is or will be applied retroactively" by the courts of appeals, or "that it satisfies the criteria for retroactive application set forth by the Supreme Court"; the statute clearly states that "the Supreme Court" must have made the rule retroactive. *In re Joshua*, 224 F.3d 1281, 1283 (2000); accord *Browning* v. *United States*, No. 00-7096 (10th Cir. Mar. 1, 2001), slip op. 4 ("[A] rule is 'made retroactive' by the Court only if the Court actually applies the rule retroactively, or makes some explicit statement regarding retroactivity."); *In re Tatum*, 233 F.3d 857, 859 (5th Cir. 2000) (petitioner "must point to a Supreme Court decision that either expressly declares the collateral availability of the rule . . . or applies the rule in a collateral

proceeding"); *Rodriguez* v. *Superintendent, Bay State Corr. Ctr.*, 139 F.3d 270, 274-275 (1st Cir. 1998) (AEDPA "invests the [Supreme] Court with the sole authority" to declare new rules retroactive on collateral review for successive petitions); *Bennett* v. *United States*, 119 F.3d 470, 471 (7th Cir. 1997) ("only when a decision has been specifically declared retroactive by the Supreme Court may it be used as the basis for a successive motion for habeas corpus"); *In re Vial*, 115 F.3d 1192, 1197 (4th Cir. 1997) (en banc) (Section 2244(b)(2)(A) requires that "the Supreme Court declare[] the collateral availability of the rule in question, either by explicitly so stating or by applying the rule in a collateral proceeding"); see also H.R. Conf. Rep. No. 518, 104th Cong., 2d Sess. 111 (1996) (AEDPA provision limits successive applications for postconviction relief to those applications "that involve new constitutional rights that have been retroactively applied by the Supreme Court").[3]

2. This Court's decision in *Williams* v. *Taylor*, 529 U.S. 362 (2000), which construed an analogous provision of the AEDPA, strongly supports the conclusion that Section 2244(b)(2)(A) requires an explicit ruling by this Court making a new rule retroactive. In *Williams*, the Court considered 28 U.S.C. 2254(d)(1), which permits a federal habeas court to grant relief on a claim adjudicated by a state court only if the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." This Court held that the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" in Section 2254(d)(1) "refers to the holdings, as opposed to the dicta, of this Court's decisions," and "restricts the source of clearly established law to this Court's jurisprudence." 529 U.S. at 412; accord *id.* at 382 (Stevens, J., concurring). There is no indication that Congress intended its requirement of action "by the Supreme Court" in Sections 2244 and 2254 to have different meanings. Rather, the phrase "made retroactive * * * by the Supreme Court," like the phrase "determined by the Supreme Court," requires a specific ruling by this Court itself; a lower court's prediction about what this Court might do, or its application of principles found in this Court's decisions generally, is not sufficient.

Petitioner argues (Br. 16-17) that the provision at issue in *Williams* deserves a different construction because it uses the phrase "clearly established Federal law, as determined by the Supreme Court," while Section 2244(b)(2)(A) uses the phrase "made retroactive * * * by the Supreme Court." But it is natural for Congress to speak of this Court "determin[ing]" federal law, just as it is natural to speak of this Court "ma[king] retroactive" a particular new rule. Nothing in the two phrases points to an intention, in one provision, to require specific action by this Court while, in another provision, to invoke only "general principles" in this Court's decisions. The point of both provisions is that Congress was careful to specify that this Court had to take the necessary action—either determining the

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[3] Two courts of appeals have reached the contrary conclusion, and permit retroactivity decisions to be made under Section 2244(b)(2)(A) by the lower courts. For the reasons discussed below, those decisions are incorrect. See *West* v. *Vaughn*, 204 F.3d 53, 59-62 (3d Cir. 2000); *Flowers* v. *Walter*, 2000 WL 33157575, at *5 (9th Cir. Feb. 9, 2001).

content of the legal rule in Section 2254(d)(1) or making the new rule retroactive in Section 2244(b)(2)(A).[4]

Petitioner also suggests that the definition of the word "made" in Section 2244(b)(2)(A) is broad enough to embrace the meaning of "to have 'caused to occur,'" and that the verb "make" can be defined as "to cause to exist." Br. 15-16 (citing dictionary definitions). On that basis, he posits that Congress's use of the word "made" could include the act of "'making' something happen indirectly" (Br. 16), such as by announcing general principles that compel particular results (Br. 21-22). The dictionary definitions that petitioner cites do not support his argument that the word "made" can refer to entirely indirect action, such that this Court could be said to have "made" an event occur by announcing a broad legal standard that is then applied to a specific context by a lower court.[5] In the context of the

[4] Petitioner cites (Br. 16-17) a variety of other provisions in the AEDPA that, he says, clearly specify that "something be done directly by a specific court"; he argues that in those provisions "the statutory language makes unmistakably plain that a particular court must do something actively, directly, and expressly." Section 2244(b)(2)(A), however, provides an equally unmistakable requirement that a new decision is not available to second or successive habeas petitioners until it has been "made retroactive * * * by the Supreme Court."

[5] For example, petitioner relies (Br. 15) on definitions of "make" that the Third Circuit drew from *Webster's Third New International Dictionary* (1986). The meanings given in that dictionary do not, however, apply to entirely indirect and general causation. For example, the dictionary does define "make" as "to cause to exist, occur, or appear: bring to pass: create, cause," but then gives as examples "God *made* heaven and earth," "make a disturbance," "his entrance made a sensation," "making a fuss over nothing," and "making mischief." *Id.* at 1363. The same dictionary also defines "make" as "to cause to be or become: put in a certain

AEDPA, the phrase "made retroactive * * * by the Supreme Court" clearly refers to a concrete and specific act of this Court that establishes that a particular "new rule" is applicable on collateral review. Indeed, this Court has itself used the phrase "made retroactive" to describe its own rulings concerning the retroactive application of particular constitutional rules.[6]

3. If Congress had wished to express the meaning that petitioner ascribes to Section 2244(b)(2)(A), it had a variety of simpler and more direct ways to do so. The provision at issue in *Williams*, Section 2254(d)(1), itself suggests one model for how Congress could have written the statute to embody petitioner's view that the retroactivity finding need merely result from an application of "the principles of" this Court's decisions. Pet. Br. 21-22. Congress could have framed Section 2244(b)(2)(A), as it did Section 2254(d)(1), by speaking of the "application of" this Court's decisions. Such a

state or condition." *Ibid.* The examples given for that meaning are: "trying to make the matter clear to everyone," "was *made* leader of the expedition," "*made* him sorry he had spoken so quickly," "*made* the scene real for us," and "made himself useful around the house." The examples illustrate that the word "make" does not encompass indirect and general action, such as announcing general principles of retroactivity that are then applied by the lower courts. The other dictionary cited by petitioner contains similar examples. Nothing in either dictionary supports petitioner's theory.

[6] See *Arsenault* v. *Massachusetts*, 393 U.S. 5, 6 (1968) ("The right to counsel at the trial (*Gideon* v. *Wainwright*, 372 U.S. 335); on appeal (*Douglas* v. *California*, 372 U.S. 353); and at the other 'critical' stages of the criminal proceedings (*Hamilton* v. *Alabama*, *supra*) have all been *made retroactive*.") (emphasis added); *Stovall* v. *Denno*, 388 U.S. 293, 300 (1967) ("We conclude * * * that the *Wade* and *Gilbert* rules should not be *made retroactive*.") (emphasis added).

provision could have conditioned a second or successive habeas petition on a showing that the new rule cited in the petition has been "made retroactive to cases on collateral review *by application of the principles determined* by the Supreme Court." Instead, however, Congress chose the quite different formulation that omits the italicized portion and simply requires that the rule have been "made retroactive to cases on collateral review by the Supreme Court."

Indeed, on petitioner's view, the phrase "by the Supreme Court" in Section 2244(b)(2) is entirely superfluous. If the statute had said only that a second or successive habeas petitioner must invoke a "new rule of constitutional law, made retroactive to cases on collateral review," the lower courts would have had to apply the well-established "principles" found in this Court's retroactivity jurisprudence. Those retroactivity decisions—like decisions of this Court on any other federal question—bind all federal and state courts, regardless of whether Congress so provides. See *Cooper* v. *Aaron*, 358 U.S. 1, 18-19 (1958). And this Court's *Teague* rules were announced and defined long before the enactment of the AEDPA. Accordingly, petitioner's reading of the statute would render the phrase "by the Supreme Court" without function, contrary to this Court's repeated admonition to avoid an interpretation of a statute that renders words superfluous. See, *e.g.*, *Bailey* v. *United States*, 516 U.S. 137, 150 (1996); *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 121 S. Ct. 675, 682-683 (2001) (declining to adopt a construction that would "read[] [a] term * * * out of the statute" and "give it no effect whatever").

Under our reading of Section 2244(b)(2)(A), by contrast, all of the terms of the statute are given effect,

and the statute can be read harmoniously as a whole. Section 2244(b)(2)(A) provides that a second or successive petition must rely on a new rule "made retroactive to cases on collateral review by the Supreme Court." The provision requires a decision by this Court holding that a "new rule" satisfies the stringent standards of *Teague* for retroactive application; only then can a second or successive habeas petitioner satisfy the gatekeeping requirement.[7]

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[7] The AEDPA also provides a 1-year limitations period. 28 U.S.C. 2244(d)(1) provides that "[t]he limitation period shall run from the latest of" four dates, of which one is "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. 2244(d)(1)(C). In order to apply that provision, it must be determined whether "the right has been * * * made retroactively applicable to cases on collateral review." 28 U.S.C. 2244(d)(1)(C). If that phrase refers to action by this Court making the rule retroactive, as our construction of the similar language in the gatekeeping provision suggests, then the inquiry is manageable and a uniform nationwide standard will result. If, on the other hand, the question is just whether the principles of *Teague* make the new rule retroactive, as petitioner's argument in this case suggests, then no decision by any court would be necessary, and the retroactivity clause would be entirely redundant. Even if the action of a court of appeals or district court applying *Teague* were necessary, it is highly unlikely that Congress intended to hinge the application of the statute of limitations on whether some court of appeals or district court somewhere in the country had found that the new rule satisfied *Teague*. The limitations provision should not be given such an indefinite interpretation, nor should the gatekeeping provision. The similar language in both provisions should be read to require specific action by this Court to make the new rule retroactive.

B. A Requirement That This Court Pass On The Retroactivity Issue Accords With Congress's Intent And Provides A Workable Standard

A test that looks to an actual Supreme Court decision on retroactivity is easily applied and accords with Congress's intention to limit the cases in which a second or successive habeas petitioner may proceed to court. In contrast, petitioner's position—that second or successive habeas petitioners may proceed "when the principles of this Court's decisions compel the conclusion that [the new rule] must be retroactive" (Br. 15)—is inconsistent with Congress's intent in enacting the AEDPA and would be difficult to apply in a workable manner.

1. A central purpose of the AEDPA is to "curb the abuse of the statutory writ of habeas corpus." H.R. Conf. Rep. No. 518, *supra*, at 111. Requiring a second or successive habeas petitioner, who relies on a new rule of constitutional law, to point to a specific ruling by this Court making the rule in question retroactive is consistent with that purpose. Any prisoner filing a second or successive petition has already had the opportunity for direct review of his conviction and state post-conviction review. In addition, he has filed and fully litigated an initial federal habeas petition. Congress did not want to cut off all opportunity for prisoners in that position to bring a second or successive habeas petition. But Congress did want to "further restrict[]," *Felker* v. *Turpin*, 518 U.S. at 664, the ability of prisoners who had previously filed habeas petitions to mount new challenges to their convictions and sentences, at a time when both their own attention and that of the courts and prosecutors should be turned to other matters. "No one, not criminal defendants, not the

judicial system, not society as a whole is benefitted by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation." *Mackey* v. *United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part).

Section 2244(b)(2)(A) accomplishes Congress's purpose by giving prisoners a "second bite at the apple" only in truly exceptional cases. Not only must the prisoner rely on "a new rule of constitutional law"—which can explain why the prisoner did not previously obtain relief on that basis—but the rule must have been "made retroactive to cases on collateral review by the Supreme Court." Congress thereby eliminated the opportunity for prisoners to bring second or successive petitions in order to *establish* that a new rule should be retroactively applied. The time for establishing that a new legal principle should be applied on collateral review expired with the prisoner's first habeas petition, which could have served as the vehicle for exploring new and controversial applications of retroactivity principles. And Congress sought to free the lower courts from adjudicating the potentially large volume of second or successive habeas petitions that relied on a new rule until this Court had determined that the rule is, in fact, retroactive. Only where both the validity and the retroactivity of the new rule have been established —finally and conclusively by a decision of this Court— did Congress intend to permit reopening criminal convictions and sentences in a second or successive petition.[8]

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[8] Petitioner is therefore correct (Br. 14 n.4) that a consequence of our position is that a prisoner may be "entitled to have [a new

2. Unlike petitioner's construction, an interpretation of Section 2244(b)(2)(A) that requires a Supreme Court decision on retroactivity fits comfortably within the "gatekeeping" scheme of the statute. Under 28 U.S.C. 2244(b)(3), before a second or successive application for habeas relief may be filed, the habeas petitioner must "move in the appropriate court of appeals for an order authorizing the district court to consider the application." The court of appeals may issue such an order "only if it determines that the application makes a prima facie showing that the application satisfies" the requirements of Section 2244(b)(2). 28 U.S.C. 2244(b)(3)(C). The court of appeals has only thirty days to make the gatekeeping decision. 28 U.S.C. 2244(b)(3)(D).

Under our reading, the courts of appeals should be able to dispose of gatekeeping motions under Section 2244(b)(3) relatively quickly and easily. They need only ascertain what claim the second or successive petition makes and then compare that claim with this Court's decisions on retroactivity. Indeed, because the standards for retroactivity are stringent and only a few new rules will likely be made retroactive, see *Graham* v. *Collins*, 506 U.S. at 478; *Sawyer* v. *Smith*, 497 U.S. 227, 243 (1990); *Teague* v. *Lane*, 489 U.S. at 313 (plurality

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rule] retroactively applied in an *initial* habeas petition, but not in a *successive* habeas petition." The inescapable point of Section 2244(b)(2)(A) is that second or successive petitioners must satisfy substantially stricter standards to obtain relief than those litigating a first petition. The reason for the differential treatment is not that a second or successive petition necessarily contains weaker constitutional claims than a first petition, but that a second or successive petition is a more severe affront to the interest in finality than is a first petition. See *McCleskey* v. *Zant*, 499 U.S. 467, 492 (1991).

opinion), ruling on the gatekeeping motion will likely require little expenditure of time and effort.

By contrast, under petitioner's theory (Br. 21-22), the courts of appeals must determine whether "the principles of this Court's decisions compel the conclusion that [the new rule] must be retroactive." That question can be quite complex. See *Saffle* v. *Parks*, 494 U.S. at 495 ("the precise contours of [*Teague*'s second exception for 'watershed rules of criminal procedure'] may be difficult to discern"). The fact that Congress intended the gatekeeping issue to be resolved speedily and without full litigation is inconsistent with petitioner's approach. Rather, the gatekeeping scheme suggests that Congress imposed on the courts of appeals only the efficient and manageable inquiry that the statutory language directs: whether the new rule on which the petition relies has already been "made retroactive to cases on collateral review by the Supreme Court."

3. Petitioner contends (Br. 18-20) that interpreting Section 2244(b)(2)(A) to require an express ruling by this Court would create an anomalous result, in that the Court is less likely to have the occasion to issue a decision making a particular rule retroactive where it is "obvious" that the rule should be applied retroactively. He notes that in *Bousley* v. *United States*, 523 U.S. 614, 619-621 (1998), the Court held that the rule of *Teague* v. *Lane* did not bar application to cases on collateral review of the decision in *Bailey* v. *United States*, 516 U.S. 137, 144 (1995), which narrowed the scope of criminal liability under former 18 U.S.C. 924(c). Petitioner argues (Br. 18 & n.8) that adopting the court of appeals' interpretation of Section 2244(b)(2)(A) would preclude prisoners from filing second or successive applications for post-conviction relief "in cases involving rules that,

under *Bousley*, are necessarily retroactive." Petitioner's contention is flawed.

a. The AEDPA itself bars second or successive petitioners from raising claims under Section 2254 or 2255 based on intervening decisions defining the scope of criminal statutes. Section 2244(b)(2) limits claims that may be raised in second or successive habeas petitions to those based on newly discovered evidence and those that rely on "new rule[s] of constitutional law." Section 2255 imposes similar limits on Section 2255 motions. As the Second Circuit has explained, a habeas petitioner's claim based on an intervening statutory decision like the one in *Bailey* is "new, but not constitutional." *Triestman* v. *United States*, 124 F.3d 361, 372 (1997). Accordingly, there is no basis for petitioner's suggestion (Br. 19 n.8) that adopting the court of appeals' interpretation of "made retroactive" would "choke off access" to the courts for prisoners seeking to raise statutory claims in second or successive collateral attacks under Section 2255; such claims are not available under Section 2255 in any event because they are not based on a "new rule of constitutional law."[9]

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[9] The courts of appeals have uniformly held that a federal prisoner who relies on *Bailey* v. *United States* cannot file a second or successive motion under Section 2255 because the claim does not rely on a new constitutional rule; at the same time, those courts have held that such prisoners may resort to 28 U.S.C. 2241 under the habeas "savings clause" in Section 2255 for cases in which Section 2255 is "inadequate or ineffective." See, *e.g.*, *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997); *Triestman*, 124 F.3d at 376-380; *In re Davenport*, 147 F.3d 605 (7th Cir. 1998). Because of the availability of the "savings clause," there is no concern that federal prisoners who have a claim based on a new decision of this Court cutting back on the sweep of a criminal statute (see Pet. Br. 18) will lack a remedy. There is therefore no basis for distorting the

b. Petitioner also errs in claiming that reading Section 2244(b)(2)(A) to require a decision by this Court that made a new rule retroactive would create an anomaly. Petitioner asserts (Br. 18) that the anomaly is produced because a new rule that is most likely to be retroactive is least likely to generate a conflict in the circuits that would warrant a decision on retroactivity by this Court.

Rule 10(c) of the Rules of this Court states that a consideration in deciding whether to grant certiorari is whether a lower court "has decided an important question of federal law that has not been, but should be, settled by this Court." Cases presenting retroactivity issues, where the lower courts have all agreed that the new rule is retroactive, may well fall within that category, especially in light of Congress's express reliance on decisions of this Court in Section 2244(b)(2)(A). The number of new procedural rules that should be made retroactive is likely to be exceedingly small. As the Court has noted, new rules that should be applied retroactively must establish a "bedrock procedural element[]" that is vital to the fairness of the proceeding, *Sawyer* v. *Smith*, 497 U.S. at 242 (quoting *Teague* v. *Lane*, 489 U.S. at 311 (plurality opinion)), and it is "unlikely that many such components of basic due process have yet to emerge." *Butler* v. *McKellar*, 494 U.S. at 416 (1990) (quoting *Teague* v. *Lane*, 489 U.S. at 312 (plurality opinion)).[10]

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text of the gatekeeping provision (either in Section 2244(b)(2)(A) or in the identically worded Section 2255) in an effort to create such a remedy.

[10] The same conclusion follows with respect to new rules that are exceptions to the *Teague* non-retroactivity principle because they place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to pro-

4. The court of appeals correctly held that this Court has not yet made the *Cage* rule retroactive to cases on collateral review for purposes of Section 2244(b)(2)(A). Petitioner contends (Br. 22) that the decision in *Sullivan* v. *Louisiana*, 508 U.S. 275, 278-282 (1993), which held that a constitutionally deficient reasonable doubt instruction cannot be harmless error, "compels the conclusion" that the *Cage* rule should be applied retroactively. As discussed more fully below, see pp. 25-29, *infra*, *Sullivan*'s holding that *Cage* errors are not amenable to harmless-error review does not resolve whether *Cage* announced a new rule that should be applied retroactively to proceedings on collateral review.

In arguing that the *Cage* rule has already been made retroactive by this Court, petitioner also relies (Br. 28) on the disposition in *Adams* v. *Evatt*, 511 U.S. 1001 (1994), in which the Court vacated a court of appeals' holding that retroactive application of *Cage* was barred

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scribe." *Teague* v. *Lane*, 489 U.S. at 311 (plurality opinion). Petitioner's view (Br. 18 n.8) that questions regarding the retroactivity of such rules are unlikely to reach this Court is speculative at best. The question whether any such rule is retroactive to cases on collateral review may well reach this Court on a petition for certiorari from a first federal habeas petition and could be raised on an original habeas petition filed in this Court. See *Felker* v. *Turpin*, 518 U.S. 654, 658-663 (1996). Indeed, a first federal habeas petition could present a retroactivity question to this Court not only if a lower court directly addresses the retroactivity issue, but also if the lower court addresses whether the rule on which the habeas petitioner relies is genuinely "new" under *Teague* or whether it is genuinely a rule that protects primary conduct from criminal punishment. In any event, the premise of Section 2244(b)(2)(A) is that principles of finality are of sufficient importance that some otherwise meritorious second and successive habeas petitions should be barred.

by *Teague*, and remanded for further consideration in light of *Sullivan* v. *Louisiana*, *supra*. As the First Circuit has explained, however, a summary reconsideration like the one in *Adams* "does 'not amount to a final determination on the merits'"; rather, "[s]uch an order merely directs the lower court to reexamine the case against the backdrop of some recent, intervening precedent; [but] does not compel a different result." *Rodriguez*, 139 F.3d at 276 (quoting *Henry* v. *City of Rock Hill*, 376 U.S. 776, 777 (1964) (per curiam)); see also Robert L. Stern et al., *Supreme Court Practice* 249-250 (7th ed. 1993). Accordingly, the Court's action in *Adams* does not satisfy the statutory requirement that this Court have considered the issue of retroactivity and have expressly decided in favor of retroactive application.

II. THE NEW CONSTITUTIONAL RULE ANNOUNCED IN *CAGE* V. *LOUISIANA* SHOULD NOT BE APPLIED RETROACTIVELY TO CASES ON COLLATERAL REVIEW

1. New constitutional rules of criminal procedure are not retroactively applicable to proceedings on collateral review unless they satisfy one of the two exceptions discussed in this Court's *Teague* line of cases. *Teague*'s non-retroactivity principle is based on the purposes of the writ of habeas corpus and considerations of finality in the criminal law. The writ of habeas corpus exists as a safeguard against a fundamental miscarriage of justice; it has never been defined "by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error." *Kuhlmann* v. *Wilson*, 477 U.S. 436, 447 (1986) (plurality opinion); *Teague* v. *Lane*, 489 U.S. at 308 (plurality opinion). Generally, the purpose of collateral review is

to ensure that courts conduct their proceedings in a manner consistent with the law in existence at the time, "and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine." *Sawyer* v. *Smith*, 497 U.S. at 234. The distinction between law that prevailed at the time of trial and later-announced rules is important, because "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague* v. *Lane*, 489 U.S. at 309 (plurality opinion). Accordingly, the "new rule" principle of *Teague* "validates reasonable, good-faith interpretations of existing precedents made by [lower] courts even though they are shown to be contrary to later decisions." *Butler* v. *McKellar*, 494 U.S. at 414; *Saffle* v. *Parks*, 494 U.S. at 488.

2. This Court has defined a "new rule" under *Teague* as one that was not "*dictated* by precedent existing at the time the defendant's conviction became final." *Graham* v. *Collins*, 506 U.S. at 467; *Sawyer* v. *Smith*, 497 U.S. at 234; *Teague* v. *Lane*, 489 U.S. at 301 (plurality opinion); see also *O'Dell* v. *Netherland*, 521 U.S. 151, 164 (1997) (test for whether decision announces new rule is whether, at the time of the decision, a "reasonable jurist" would have felt "compelled" to adopt the rule it stated). As petitioner acknowledges (Br. 11-13), *Cage* clearly adopted a new rule under that standard. No prior decision had "dictated" that the reasonable doubt instruction in *Cage* violated the Due Process Clause.

3. The *Cage* rule does not fall within either of the narrow exceptions to *Teague*'s principle of non-retroactivity. The first *Teague* exception covers rules defining a class of conduct that the legislature may not

regulate under the criminal law. *Teague* v. *Lane*, 489 U.S. at 311 (plurality opinion); *Butler* v. *McKellar*, 494 U.S. at 415. Relatedly, it also applies to rules prohibiting a certain type of punishment for a particular class of defendants. See *Saffle* v. *Parks*, 494 U.S. at 494; *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1989). *Cage* neither protected primary conduct, nor restricted punishment, so that exception is plainly inapplicable.

4. The second *Teague* exception is limited to "watershed rules of criminal procedure" that are "central to an accurate determination of innocence or guilt." *Teague* v. *Lane*, 489 U.S. at 311, 313 (plurality opinion); see *Sawyer* v. *Smith*, 497 U.S. at 241- 242; *Saffle* v. *Parks*, 494 U.S. at 495; *Butler* v. *McKellar*, 494 U.S. at 416. This Court has made clear that for a rule to fall within *Teague*'s second exception, it must satisfy two distinct conditions that Justice Harlan originally proposed—an "accuracy element" and a "fundamental fairness" element. *Teague* v. *Lane*, 489 U.S. at 312 (plurality opinion). First, infringement of the new rule must "seriously diminish the likelihood of obtaining an accurate conviction," *id.* at 315, and second, the new rule must "'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding," *Sawyer* v. *Smith*, 497 U.S. at 242 (quoting *Teague* v. *Lane*, 489 U.S. at 311 (plurality opinion)).

Petitioner contends (Br. 24-28) that the Court's ruling in *Sullivan* v. *Louisiana*, 508 U.S. at 281-282, that violations of the *Cage* rule are "structural" error makes clear that *Cage* announced a "watershed" rule within the meaning of the second *Teague* exception. Contrary to petitioner's argument (Br. 25), the Court has not adopted "essentially identical" tests for determining whether a constitutional rule falls within the *Teague* exception and for determining whether a

violation of that rule is not subject to harmless-error review. A decision that a given rule is not subject to harmless-error review does suggest that that rule may satisfy the "accuracy element" in the second *Teague* exception. It has little to do, however, with the question whether the new rule is a "bedrock procedural element[]." *Teague* v. *Lane*, 489 U.S. at 311 (plurality opinion; emphasis omitted).

a. As *Sullivan* makes clear, an error qualifies as "structural" when it is impossible to determine the effect of the error on the jury's verdict—and therefore impossible to conduct harmless error review. The Court concluded in *Sullivan* that a trial court's error in giving a defective reasonable-doubt instruction "was not subject to harmless-error analysis because it 'vitiates all the jury's findings,' * * * and produces 'consequences that are necessarily unquantifiable and indeterminate.'" *Neder* v. *United States*, 527 U.S. 1, 11 (1999) (quoting *Sullivan*, 508 U.S. at 281-282); see *Brecht* v. *Abrahamson*, 507 U.S. 619, 629 (1993) (unlike trial error, which "is amenable to harmless-error analysis because it 'may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial],'" structural errors "defy analysis by harmless-error standards") (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 307-309 (1991)). In that respect, a "structural" error may well implicate the "accuracy element" of the second *Teague* exception.

b. The fact that it may be impossible to determine an error's effect on a jury verdict—and that harmless error analysis is therefore impossible—has little to do with whether the error satisfies the "fundamental fairness" element of the second *Teague* exception. To satisfy that element, a new rule must "'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." *Sawyer* v. *Smith*, 497 U.S. at 242 (quoting *Teague* v. *Lane*, 489 U.S. at 311 (plurality opinion)). This Court's decision in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), for example, established for the first time that a criminal trial cannot satisfy standards of fundamental fairness if the defendant does not have the opportunity to be represented by counsel. In that sense, it "alter[ed] our understanding" of what is necessary for a fair trial. Before *Gideon*, it was believed that a defendant could have a fair trial without being provided with the opportunity to have an attorney; after *Gideon*, it was clear that a fair trial could not be conducted in that manner. Similarly, the plurality in *Teague* gave as examples of "watershed rules" those that constituted "the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods." 489 U.S. at 313. Each of those holdings similarly "altered our understanding" of the "bedrock procedural elements" of a fair trial

The rule announced in *Cage* does not satisfy that standard. *Cage* did not announce the constitutional requirement of proof beyond a reasonable doubt. It had been well established that the government must prove all elements of the offense beyond a reasonable doubt since at least the time of *In re Winship*, 397 U.S. 358, 364 (1970). Rather than altering—or even reinterpreting—that requirement, the Court in *Cage* merely applied it to the particular jury instruction in that case. Such applications of settled legal principles in somewhat different contexts cannot be described as

"watershed" or "bedrock"; they are instead part of the ordinary process of constitutional adjudication. Although such adjudication may result in a "new rule," as it did in *Cage*, and it may even result in a rule that proves impervious to ordinary harmless error review, as *Sullivan* held was true of *Cage*, each application of an established constitutional protection does not produce a "watershed" or "bedrock" principle.[11]

This Court's decision in *Cage* itself reinforces that conclusion. This Court decided *Cage* in a three-page, per curiam opinion, without the benefit of full briefing and argument. The Court's legal analysis consisted of a single paragraph, see 498 U.S. at 41, which simply found that some of the language in the jury instruction "suggest[s] a higher degree of doubt than is required for acquittal under the reasonable-doubt standard." *Ibid.* That treatment of the case is entirely consistent with an application of a settled legal standard in a new context; it is not consistent with the discovery of a new "bedrock procedural element" or "watershed" rule.

Moreover, the conclusion that *Cage* merely applied the *Winship* rule in a new context is underscored by the Court's decision in *Victor* v. *Nebraska*, 511 U.S. 1 (1994). In that case, the Court considered the constitutionality of two reasonable doubt instructions in light of

[11] Nothing in the Court's opinion in *Sullivan* suggests that *Cage* was a "bedrock" or "watershed" rule in the required sense. The Court's reasoning in *Sullivan* focused on the "pure speculation" that a reviewing court would have to engage in if it attempted to apply harmless error review where a "misdescription of the burden of proof * * * vitiate[d] *all* the jury's findings." 508 U.S. at 281. The Court also focused on the serious nature of a denial of the right to trial by jury, "without which a criminal trial cannot reliably serve its function." *Ibid.* Both of those concerns had to do with the "accuracy element" of the second *Teague* exception.

Cage. Although the instructions challenged in *Victor* were similar in many respects to the instruction at issue in *Cage*, the Court held that the particular language of those instructions, when read as a whole, was not reasonably likely to have been applied unconstitutionally. See *Victor*, 511 U.S. at 17 (noting that challenged instruction and *Cage* instruction "included an almost identical reference to 'not a mere possible doubt'"); *id.* at 21-22 (comparing use of phrase "moral certainty" in instruction at issue with use of that phrase in *Cage* instruction). The difference between the instructions in *Victor* and those in *Cage* is the difference between an adequate and an inadequate explication of the reasonable doubt standard. Neither decision, however, fundamentally altered the Court's understanding of the bedrock procedural elements necessary for a fair trial.

5. As in *Sawyer* v. *Smith*, 497 U.S. at 243, "[i]t is difficult to see any limit to the definition of the second [*Teague*] exception if cast as proposed by petitioner." This Court regularly considers the application of the bedrock constitutional principles of criminal procedure to particular contexts, such as the right to counsel, see *Smith* v. *Robbins*, 528 U.S. 259 (2000); the privilege against compelled self-incrimination, see *Mitchell* v. *United States*, 526 U.S. 314 (1999); or the right to confront witnesses, see, *e.g.*, *Lilly* v. *Virginia*, 527 U.S. 116 (1999); *Gray* v. *Maryland*, 523 U.S. 185 (1998). Under petitioner's reasoning, each such case (if decided in favor of the defendant) would result in a "watershed" or "bedrock" rule that satisfies the second *Teague* exception, because each such case would be based on the lack of a protection—the right to counsel, to a jury trial, to confront witnesses, etc.—that is, in the abstract, "fundamental to the fairness of the proceeding."

Pet. Br. 27. If that were so, this Court would surely have been wrong in insisting that the second *Teague* exception would apply only to "a small core of rules," *Graham* v. *Collins*, 506 U.S. at 478, and that "it [is] unlikely that many such components of basic due process have yet to emerge." *Teague* v. *Lane*, 489 U.S. at 313 (plurality opinion); accord *Sawyer* v. *Smith*, 497 U.S. at 243; *Butler* v. *McKellar*, 494 U.S. at 416. The premise of this Court's *Teague* cases has been that retroactive application to cases on collateral review should be reserved for the truly exceptional rule in which the Court has altered a fundamental understanding of what constitutes a fair trial. Because no such alteration took place in *Cage*, the decision in that case does not apply retroactively.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

STATUTORY PROVISION INVOLVED

Section 2244 of Title 28 of the United States Code (Supp. IV 1998) provides as follows:

Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appeal-

able and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

APPENDIX B

The following reasonable doubt instruction was given at petitioner's trial:

> If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused. This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a grave uncertainty, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a moral certainty of the defendant's guilt. If after giving a fair and impartial consideration of all of the facts in the case, you find the evidence unsatisfactory upon any single point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.
>
> The prosecution must establish guilt by legal and sufficient evidence beyond a reasonable doubt, but the rule does not go further and require a preponderance of testimony. It is incumbent upon the state to prove the offense charged, or legally included in the indictment, to your satisfaction and beyond a reasonable doubt. A reasonable doubt is

not a mere possible doubt. It should be an actual or substantial doubt. It is such a doubt as a reasonable man would seriously entertain. It is a serious doubt, for which you could give good reason.

See J.A. 9-10.

(10)

No. 00-5961

IN THE

Supreme Court of the United States

MELVIN TYLER,

Petitioner,

vs.

BURL CAIN, Warden,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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39 pp

QUESTIONS PRESENTED

Does the rule of *Cage* v. *Louisiana* qualify for the "new rule" exception to the statutory bar on successive petitions, 28 U. S. C. § 2244(b)(2)(A), in the case of a petitioner whose first federal petition was filed in 1988? Specifically:

1. Has *Cage* been made retroactive to cases on collateral review by this Court?

2. If not, should it be in this case?

3. Was a *Cage* claim "previously unavailable" within the meaning of the statute?

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IN THE

Supreme Court of the United States

MELVIN TYLER,

Petitioner,

vs.

BURL CAIN, Warden,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves the proper interpretation of Congress's landmark reform of habeas corpus law in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This law, if

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

properly implemented, will greatly reduce unnecessary delay in the enforcement of the criminal law. These changes would advance the rights of victims and society which CJLF was formed to protect.

This case focuses on two particular aspects of habeas law of particular interest to CJLF: retroactivity and successive petitions. The statutory reforms at issue build on two landmark cases in which CJLF's participation was significant. See *Teague* v. *Lane*, 489 U. S. 288, 300 (1989); *McCleskey* v. *Zant*, 499 U. S. 467, 523, n. 10 (1991) (Marshall, J., dissenting). This case therefore has special interest to us.

SUMMARY OF FACTS AND CASE

On March 20, 1975, Melvin Tyler intentionally fired a gun through the window of an occupied dwelling, *i.e.*, his girlfriend's home, killing his own infant daughter. Brief for Petitioner 2-3. At his trial, the jury was given an instruction on reasonable doubt. To highlight the similarities and differences between this instruction and the one in *Cage* v. *Louisiana*, 498 U. S. 39 (1990), we print it here in legislative amendment style. Words in the present case but not in *Cage* are in italics, and words in *Cage* but not in the present case are in strikeout type. The sources are *State* v. *Cage*, 554 So. 2d 39, 41 (La. 1989) and Brief for Petitioner 3-4:

> "If you entertain ~~a~~ *any* reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your *sworn* duty to give him the benefit of that doubt and return a verdict of ~~not guilty~~ *acquittal*. Even where the evidence demonstrates a probability of guilt, *yet* if it does not establish ~~such guilt~~ *it* beyond a reasonable doubt, you must acquit the accused. This doubt ~~, however,~~ must be a reasonable one; that is, one ~~that is~~ founded upon a real, tangible, substantial basis, and not upon mere caprice, *fancy or* ~~and~~ conjecture. It must be such a doubt as would give rise to a grave uncertainty, raised in your mind*s* by reason~~s~~ of the unsatisfactory character of the evidence ~~or lack thereof~~.*; one that would make you feel that you had not an abiding conviction to a moral certainty of the defendant's guilt*. If, after giving a fair and impartial consideration *of* ~~to~~ all the facts in the case, you find the evidence unsatisfactory ~~or lacking of one~~ *upon* any single point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty. The prosecution must establish guilt by legal and sufficient evidence beyond a reasonable doubt, but the rule does not go further and require a preponderance of testimony. It is incumbent upon the state to prove the offense charged, or legally included in the indictment, to your satisfaction and beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt. It ~~is~~ *should be* an actual *or* substantial doubt. It is *such* a doubt ~~that~~ *as* a reasonable man ~~can~~ *would* seriously entertain. *It is a serious doubt for which you could give good reason.* What is required is not an absolute or mathematical certainty, but a moral certainty."

Tyler filed five state post-conviction petitions. Brief for Petitioner 4. He filed a federal habeas corpus petition on November 8, 1988, which was denied. *Cage* was decided November 13, 1990. The Court of Appeals affirmed the denial of habeas relief in Tyler's case on November 21, 1990, *Tyler* v. *Whitley*, 920 F. 2d 929 (CA5 1990) (Table), and issued its mandate on January 2, 1991.

Five years after *Cage*, Tyler filed another state post-conviction petition, raising the instruction issue for the first time. It was denied in December 1996. Brief for Petitioner 4-5. He then sought and obtained leave to file a successive federal petition. J. A. 3. The district court found that the state court's decision on the merits was not contrary to clearly established federal law under 28 U. S. C. § 2254(d)(1). J. A. 12. The Fifth Circuit affirmed on the ground that *Cage* had not been made retroactive on collateral review by this Court. J. A. 15. This

Court granted Tyler's petition for writ of certiorari on December 11, 2000.

SUMMARY OF ARGUMENT

Under the AEDPA, a new claim in a successive petition is generally barred, but there is an exception for claims based on: (1) a new rule; (2) made retroactive by this Court; (3) which was previously unavailable. *Cage* v. *Louisiana* meets the first element, fails the second, and, in this case, fails the third. Applying the test of *Engle* v. *Isaac* and its progeny, the *Cage* claim was available when petitioner filed his first federal petition.

The statutory requirement that the particular rule has been made retroactive by this Court means what it says. Congress intentionally removed that authority from the lower federal courts. *Sullivan* v. *Louisiana* addressed a different issue and did not make *Cage* retroactive. A "grant, vacate, and remand" order does not set a precedent and does not make a rule retroactive. Rules which actually do apply retroactively on collateral review are extremely rare, and a requirement that this Court make the declaration is entirely practical and not a significant burden.

Retroactivity and harmless error are different doctrines with different, albeit related, purposes. Retroactivity focuses on how the law changes over time, so the magnitude of the change made by a new rule, relative to prior law, is important in determining whether it qualifies for the second *Teague* exception. *Cage* made only an incremental change to protections already in effect, and hence it is not a "watershed" rule. *Cage* is not retroactive under the second *Teague* exception.

ARGUMENT

I. *Cage* was a new rule, but not "previously unavailable."

Petitioner seeks to qualify for an exception to 28 U. S. C. § 2244(b)(2), the rule against raising new claims in a second habeas petition. The exception in subdivision (A), the "new rule" exception, has three elements: (1) "the claim relies on a new rule of constitutional law"; (2) that rule has been "made retroactive to cases on collateral review by the Supreme Court"; and (3) the claim "was previously unavailable . . . ."

Petitioner, whose first federal petition was litigated from 1988 to 1991, contends that *Cage* v. *Louisiana*, 498 U. S. 39 (1990) (*per curiam*), disapproved in part in *Estelle* v. *McGuire*, 502 U. S. 62, 72, n. 4 (1991), qualifies for this exception. The circuits have uniformly held that the first element is satisfied, *i.e.*, *Cage* is a "new rule," and the state does not dispute that element. In parts II and III, *infra*, we discuss why the second element is not satisfied. In this part, we explain why the third element is also missing.

The question of the third element of the statute is "fairly included" in the question presented, within the meaning of this Court's Rule 14.1(a). Congress has enacted a coherent exception to the abuse-of-the-writ bar, and the elements deal with the change in the law over time. The elements operate in conjunction to leave only a very small window. See *infra*, at 6. To address only the "new rule" and "retroactive" elements and ignore an obvious deficiency in the "previously unavailable" element would not be applying the statute Congress enacted; it would be applying a distorted version Congress did not enact. This issue "is a 'predicate to an intelligent resolution' of the question presented, and therefore 'fairly included therein.' " *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996).

Like many provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), this section builds upon and strengthens habeas limits from preexisting case law. See *Slack* v. *McDaniel*, 529 U. S. 473, 486-487 (2000) (pre-AEDPA

law used to construe "second or successive" language of statute). *McCleskey* v. *Zant*, 499 U. S. 467, 470 (1991) addressed the standard for "a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus." *McCleskey* adopted the "cause and prejudice" standard from the procedural default line of cases. See *id.*, at 493.

One type of "cause" asserted in default cases is that the defaulted argument was so novel at the time of prior proceedings that it was not available. See *Engle* v. *Isaac*, 456 U. S. 107, 134 (1982) ("available"); *Reed* v. *Ross*, 468 U. S. 1, 16 (1984) ("not reasonably available"); *Smith* v. *Murray*, 477 U. S. 527, 537 (1986) ("whether at the time of the default the claim was 'available' at all"). The statute's phrase "previously unavailable" is an obvious reference to this line of cases. Cf. *Williams* v. *Taylor*, 529 U. S. 420, 433-434 (2000) (words "failed to develop" in § 2254(e)(2) echos case law, have the same meaning as in the case law). The window of this exception was small from the start, and the "new rule" doctrine of *Teague* v. *Lane*, 489 U. S. 288 (1989) (plurality opinion), narrowed it to the eye of a needle. Any claim that is so "novel" as to be "unavailable" for *Engle*/*Reed* is necessarily "new" for *Teague*. See *Breard* v. *Greene*, 523 U. S. 371, 376-377 (1998) (*per curiam*); *Selvage* v. *Collins*, 975 F. 2d 131, 136 (CA5 1992); *Gacy* v. *Welborn*, 994 F. 2d 305, 310-311 (CA7 1993). Novelty as cause is now the path to habeas relief only if the claim qualifies for one of the two narrow *Teague* exceptions. The statute recognizes this with its twin requirements of retroactivity and previous unavailability.

Engle v. *Isaac*, *supra*, and *Reed* v. *Ross*, *supra*, bracket the novelty question. Both cases involved claims grounded in the requirement of proof beyond a reasonable doubt, as does the present case, and one found cause while the other did not.

The defendants in *Engle* v. *Isaac* were tried in three unrelated cases in 1975. See 456 U. S., at 112-115. All three cases involved self-defense, the juries were instructed that the defendants had the burden of proof, and none of the defendants

objected at trial. See *ibid.* The Court rejected the claim of novelty as cause. *In re Winship*, 397 U. S. 358 (1970) had "laid the basis" years before. See *Engle*, 456 U. S., at 131. Other defendants were making the claim, *id.*, at 131-132, and hence these defendants did not "lack[ ] the tools to construct their constitutional claim." *Id.*, at 133. A contrary precedent does not excuse a default on the ground of "futility." Courts do sometimes reconsider their precedents. See *id.*, at 130; *Bousley* v. *United States*, 523 U. S. 614, 623 (1998).

In *Reed* v. *Ross*, 468 U. S., at 3, the habeas petitioner sought the benefit of *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975) on the burden of proving malice. *Mullaney* was an application of the principle of *Winship*. See *Reed*, *supra*, at 3. The issue had not surfaced in the courts of the state until years after Ross's appeal. See *id.*, at 18. Only one federal appellate decision supported claims of this type, and that case was readily distinguishable. See *id.*, at 18-19. Most importantly for the present case, *Reed* distinguished *Engle* on the ground that Ross's default was pre-*Winship* rather than post-*Winship*, not on the ground it was pre-*Mullaney*. See *id.*, at 19. The case that establishes the general principle on which a claim is based provides the tools to construct it. Specific claims based on the general principle are not "novel" for *Engle*/*Reed*, although they are "new" for *Teague* until they are crystalized into a specific rule. Cf. *Sawyer* v. *Smith*, 497 U. S. 227, 236 (1990) (discussing level of generality). *Smith* v. *Murray*, 477 U. S., at 537, confirms that a claim is "available" if it has been "percolating." There is no requirement that it has actually been accepted by any court. See also *Bousley*, 523 U. S., at 622-623, and n. 2.

Applying these precedents to the present case is straightforward. First, we look at availability at the time of the "default." See *Engle*, 456 U. S., at 131. In successive petition cases, that is the time of the first federal petition. See *McCleskey*, 499 U. S., at 497. We need not consider whether the relevant time is the filing of that petition or its final disposition, see *In re*

Hill, 113 F. 3d 181, 183 (CA11 1997), because the answer is the same even giving petitioner the benefit of the earlier date.

Claims of the *Cage* type had not merely been "percolating" at the time Tyler filed his first federal petition. Two cases had been decided by the highest court of his own state, one of them accepting the claim. In *State* v. *Taylor*, 410 So. 2d 224, 225, n. 2 (La. 1982), the instruction was nearly identical to that in the present case. Although the court rejected the claim, it did note that the instruction had problems. See *id.*, at 225. Under the "percolating" standard of *Engle*, *Smith*, and *Bousley*, *Taylor* alone is sufficient to find that the claim was available in 1982, six years before Tyler's first federal petition.

State v. *McDaniel*, 410 So. 2d 754, 755 (La. 1982), decided a month later, involved a modified instruction. It said "great uncertainty" instead of "grave uncertainty" and "morally uncertain" instead of "not an abiding conviction to a moral certainty." The judge also added a statement about going outside the evidence. *Id.*, at 756. The court granted relief and noted that the error may be "of constitutional dimensions," citing *Winship*. *Ibid.*

Taylor and *McDaniel* can probably be reconciled given the difference in the instructions. Cf. *Victor* v. *Nebraska*, 511 U. S. 1, 21 (1994) ("abiding conviction" language "does much to alleviate any concerns"). Whether the cases are inconsistent, as petitioner claims, Brief for Petitioner 12, n. 3, or reconcilable does not matter, however. The important point is that claims of this type were being made and sometimes accepted. See also *Dunn* v. *Perrin*, 570 F. 2d 21, 23-24, and n. 1 (CA1 1978) (accepting constitutional challenge to somewhat similar instruction).

Tyler had more than sufficient tools to construct this claim in his first federal petition. He could easily have argued to the federal courts that *Taylor* was wrongly decided, and the Fifth Circuit did not finally dispose of his case until after *Cage*. Under the *Engle* rule, which Congress has now codified for

successive petitions, this claim is not cognizable on such a petition.

II. *Cage* has not yet been made retroactive on collateral review by this Court, although it could be in the present case.

A. The Statutory Requirement.

In 28 U. S. C. § 2244(b)(2)(A), Congress made an exception to the abuse-of-the-writ rule for new rules "made retroactive to cases on collateral review by the Supreme Court . . . ." Petitioner asks this Court, in essence, to rewrite this clause to say "made retroactive . . . by the district or circuit court in accordance with principles established by the Supreme Court." See Brief for Petitioner 9.

The plain meaning of "a new rule . . . made retroactive . . . by the Supreme Court" is to require action by this Court on the specific rule in question and specifically addressing retroactivity, rather than some other issue. Implicitly recognizing this, petitioner asks the Court to deviate from the plain meaning by quoting a disparaging remark about the draftsmanship of the statute. See Brief for Petitioner 14, n. 5 (quoting *Lindh* v. *Murphy*, 521 U. S. 320, 336 (1997)). This comment in *Lindh* dealt with an issue where the meaning was not plain. The difficulties which attended the drafting of this statute require, even more than normal, that the meaning be respected where it is plain.

Artistry in drafting, as in any endeavor, requires a single, coherent vision. The Mona Lisa was not painted by a committee. The statute at issue was "hammered out over the course of a great many negotiations." 141 Cong. Rec. 15,020, col. 1 (1995) (statement of Sen. Specter). Hammering leaves dents. Respect for the democratic process requires that the product of legislative compromise be left where the legislature put it and not moved somewhere else by tortured construction. In *West* v.

Vaughn, 204 F. 3d 53, 59 (2000), the Third Circuit sought to avoid the plain meaning of "made" by claiming that Congress could have used other words to make that meaning even plainer. This approach demands more of the legislative process than is realistic. While negotiating statutory language, once a point is settled and plainly expressed, negotiators move on to other points. They do not typically reopen an agreed point to alter subtle nuances of language. The Third Circuit's approach effectively demands perfection in drafting. Respect for the compromise actually reached by the democratic process requires a more realistic interpretation.

The habeas reforms of the AEDPA were the result of a profound dissatisfaction with the way habeas cases were being handled in the district courts and courts of appeals. Despite such landmark cases as *Teague* v. *Lane*, 489 U. S. 288 (1989) and *McCleskey* v. *Zant*, 499 U. S. 467 (1991), cases continued to drag on interminably. The problem was particularly acute in capital cases, where habeas corpus was effectively nullifying capital punishment. See 141 Cong. Rec. 15,037-15,038 (1995) (statement of Sen. Nickles).

The debacle surrounding the execution of Robert Alton Harris was repeatedly cited by supporters as illustrating the need for change. See, *e.g.*, 141 Cong. Rec. 15,013, col. 2 (1995) (statement of Sen. Specter); *id.*, at 4107-4108 (statement of Mr. Cunningham); *id.*, at 4111-4112 (statement of Mr. Cox). Harris's case became "final" on direct appeal in October, 1981. *Harris* v. *California*, 454 U. S. 882 (1981). State collateral proceedings and two overlapping federal petitions took another nine years. See *Harris* v. *Pulley*, 852 F. 2d 1546 (CA9 1988), opinion amended, 885 F. 2d 1354 (1989), cert. denied, 493 U. S. 1051 (1990). A *third* federal petition was denied, largely on *Teague* and *McCleskey* grounds, but that took another two years. See *Harris* v. *Vasquez*, 949 F. 2d 1497, 1528-1529 (CA9 1990), cert. denied, 503 U. S. 910 (1992). One would expect that the resolution of the *third* petition in a case with no serious question of guilt would be the end, but instead there followed

a series of evasions of the *McCleskey* limitation, see *Gomez* v. *United States Dist. Court for the Northern Dist. of Cal.*, 503 U. S. 653, 653 (1992) (*per curiam*), eventually culminating in an unusual, possibly unique, order from this Court prohibiting any more federal stays. *Vasquez* v. *Harris*, 503 U. S. 1000 (1992). The complete 141-step chronology is given in Lungren and Krotoski, Public Policy Lessons from the Robert Alton Harris Case, 40 UCLA L. Rev. 295, 315-326 (1992). While the *Harris* case was unique in the shamelessness of the evasion of *McCleskey*, it was not unusual in the length of delay in the district and circuit courts. Supporters of stronger limits had horror stories from their own states. See, *e.g.*, 141 Cong. Rec. 4098-4101 (1995) (statement of Mr. Heineman); *id.*, at 15,062, col. 2 (statement of Sen. Hatch).

An interpretation of the statute to do nothing more than codify the case law is at war with its obvious and well-known purpose. Congress understood that reforms implemented by this Court were being frustrated by foot-dragging and evasion at lower levels and took steps to change that. At several points, the mechanism Congress chose was to elevate the decision to a higher level of the federal judiciary.

Some courts of appeals had held that their own precedents could be "old rules" for *Teague*,[2] but Congress limited 28 U. S. C. § 2254(d)(1) to "clearly established federal law, as determined by the Supreme Court." The initial decision to allow a successive petition to be considered was removed from the district court and placed in the hands of a three-judge panel of the Court of Appeals. See 28 U. S. C. § 2244(b)(3). The "new rule" exceptions refer to the Supreme Court, as discussed further below. See §§ 2244(b)(2)(A) and (d)(1)(C), 2254(e)(2)(A)(i), 2255, ¶ 6, subd. (3) and ¶ 8, subd. (2). These level-raising mechanisms indicate a lack of confidence in the

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2. *Amicus* believes that these cases were wrongly decided. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 948 (1998).

lower federal courts. Congress believed, with justification, that the *Teague* and *McCleskey* reforms were not being faithfully implemented, and moving the decisions to higher levels was one of its mechanisms for dealing with that problem. In particular, Congress limited the retroactivity exception for successive petitions to new rules made retroactive by this Court.

Comparison of the three retroactivity provisions applicable to state prisoners is instructive. (The federal counterparts in § 2255 are the same.) The three create parallel exceptions to three related doctrines: abuse of the writ, procedural default, and delayed petitions. The first two are identical: "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review *by the Supreme Court*, that was previously unavailable . . . ." §§ 2244(b)(2)(A), 2254(e)(2)(A)(i) (emphasis added). The delayed petition language, *i.e.*, the new statute of limitations, is different: "if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review . . . ." § 2244(d)(1)(C).

Significantly, the latter language moves the "by the Supreme Court" requirement out of the retroactivity clause into the substantive clause. Petitioner contends that "by the Supreme Court" in the retroactivity clause of subdivision (b)(2)(A) means conformity to this Court's retroactivity jurisprudence, but the words would be superfluous if that were all they meant. Their absence from the corresponding clause of subdivision (d)(1)(C) does not authorize the courts of appeals to develop their own body of independent retroactivity law. They must still follow *Teague*. The difference in language means that, for the statute of limitations, state prisoners can file within one year of this Court's recognition of a new right, even if this Court has not resolved the status of the right's retroactivity on habeas corpus, as it typically would not if the new rule is made in a direct review case. It makes sense that Congress would be more generous with the statute of limitations, as that

relatively harsh rule cuts off prisoners who have never had a habeas petition, while the other two limits apply only to prisoners who did have a prior state or federal petition.

In *Lindh* v. *Murphy*, 521 U. S. 320, 326-329 (1997), this Court found significance in the AEDPA's use of different language in two different chapters of Title 28. Here we have different language in two subsections of the same section. The inference is much stronger here. Congress put the "by the Supreme Court" requirement in the retroactivity clause of one subsection and not the other because it intended different meanings.

Congress knew what it was doing, and the Seventh Circuit correctly recognized the meaning. "[R]etroactive application must be declared by the Supreme Court itself." *Talbott* v. *Indiana*, 226 F. 3d 866, 868 (2000). As discussed in part III A, *infra*, *Sullivan* v. *Louisiana*, 508 U. S. 275 (1993) decided a question distinct from retroactivity. That decision could not and did not make *Cage* retroactive.

B. Grant, Vacate, and Remand.

Petitioner contends that the Court's order in *Adams* v. *Evatt*, 511 U. S. 1001 (1994) makes *Cage* v. *Louisiana*, 498 U. S. 39 (1990) (*per curiam*), retroactive on habeas corpus. See Brief for Petitioner 28. The order was to grant certiorari, vacate the judgment, and remand, often referred to as a "GVR order." See *Lawrence* v. *Chater*, 516 U. S. 163, 166 (1996) (*per curiam*). This contention is completely without merit. A GVR order decides nothing. "It is precisely because of uncertainty that we GVR." *Id.*, at 172.

The typical GVR involves an intervening development in the law which creates a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration . . . ." *Id.*, at 167. "Reasonable probability" is a modest threshold. It is less than preponderance. See *Kyles* v. *Whitley*, 514 U. S.

419, 434 (1995). Sometimes the intervening development is clearly controlling and the outcome on remand is nearly certain. See, *e.g.*, *Thomas* v. *American Home Products, Inc.*, 519 U. S. 913, 914 (1996) (Scalia, J., concurring) (federal court's interpretation of state law now clearly incorrect in light of subsequent state supreme court decision). Such certainty is not required, or even the norm. A GVR may follow a new agency interpretation of a statute, which is entitled to deference but not unquestioning acceptance. See *Lawrence*, 516 U. S., at 171. GVRs may also follow "plausible confessions of error *without determining their merits.*" *Ibid.* (emphasis added).

Particularly pertinent to this present issue, the Court may GVR a case for consideration in light of a new decision by this Court without deciding whether the new decision applies to the GVR'd case. A month after *Teague*, this Court GVR'd a capital case in which the Court of Appeals had applied a new rule, and the state had not raised retroactivity. *Zant* v. *Moore*, 489 U. S. 836 (1989) (*per curiam*); *id.*, at 836 (Brennan, J., concurring) (waiver issue should be considered on remand); *id.*, at 837 (Blackmun, J., dissenting) (defense should be deemed waived). Surely the GVR in *Zant* v. *Moore* did not decide whether *Teague* applied to the penalty phase of capital cases. That issue was reserved in *Teague* and decided at the end of the term in *Penry* v. *Lynaugh*, 492 U. S. 302, 313-314 (1989). The issue of when nonretroactivity is waived was not decided until years later. See *Schiro* v. *Farley*, 510 U. S. 222, 228-229 (1994).

The Court has said often and emphatically that denial of certiorari is not precedent. See *Teague*, 489 U. S., at 296. A similar unequivocal statement is in order for GVRs. If GVRs were precedent, the Court would have to decide the merits before issuing them, cf. *ibid.*, and that would defeat their purpose. See *Lawrence*, 516 U. S., at 172-173. The GVR in *Adams* v. *Evatt* indicated that the issue was doubtful enough to require another look. That is all it meant. The retroactivity of *Cage* has not yet been decided by the Court.

C. Practical Considerations.

Petitioner invokes a parade of horribles to make a practical argument for evading the clear language of the statute. See Brief for Petitioner 17-22. The problems he sees, however, are either irrelevant or overstated.

Petitioner invokes the holding of *Bousley* v. *United States*, 523 U. S. 614, 621 (1998) that the *Teague* nonretroactivity bar does not apply to decisions on the substantive scope of federal criminal statutes. See Brief for Petitioner 17-18. This argument is irrelevant to the statute at issue. First, by its clear and unmistakable terms, 28 U. S. C. § 2244(b)(2)(A) applies only to "new rule[s] of *constitutional* law." (Emphasis added). Second, subdivision (b) only applies to state prisoners petitioning under § 2254, not to federal defendants, who must move under § 2255. *Bousley*-type claims may present a problem under the similar language of the last paragraph of § 2255, and this dilemma may arguably invoke the "inadequate or ineffective" reservation of the fifth paragraph, but that issue can and should await a case which actually presents it. See *United States* v. *Hayman*, 342 U. S. 205, 223 (1952).

Recognizing the weakness in this argument, petitioner drops a footnote discussing substantive constitutional bars to criminalizing certain conduct. Brief for Petitioner 18-19, n. 8. This is, of course, the first of the two *Teague* exceptions. See *Teague*, 489 U. S., at 311. This exception also encompasses categorical exemption of certain persons from certain punishments. See *Penry*, 492 U. S., at 330. A person sentenced to death for a murder committed at age 15 could invoke the rule of *Thompson* v. *Oklahoma*, 487 U. S. 815 (1988) retroactively on habeas corpus. As petitioner correctly notes, if anyone were actually in jail on a final judgment for flag-burning, that person could invoke *United States* v. *Eichmann*, 496 U. S. 310 (1990).

Petitioner protests that retroactivity of these rules is so obvious that decision of that question does "not meet the *ordinary* standards for the exercise of this Court's certiorari

jurisdiction," Brief for Petitioner 19 (emphasis added), and worries that the Court might allow obvious injustices to go unremedied. The answer lies in the rarity of these cases and the unlikelihood that many, if any, will arise in an "abuse of the writ" context. Thirty to forty years ago, new constitutional rights were being created at a rapid clip, but today they are not. Petitioner could only think of a single example for his brief, and we had to go back 13 years, before *Teague*, to find another. In both examples, the possibility that anyone would fail to raise the claim in the first petition seems quite remote, and the "new rule" exception does not apply to repetitive claims. See § 2244(b)(1). Rare times remote equals an extremely small number.

Division among the lower courts is not the only reason for this Court to take a case. Another reason is "an important question of federal law that has not been, but should be, settled by this Court . . . ." Supreme Court Rule 10(c). The execution of a 15-year-old or the imprisonment of a person for exercising a First Amendment right qualifies as an important question. As we discuss further, *infra*, at 18-20, there are avenues available for this Court to decide the question. The burden on the Court is quite minimal in light of the fact that these cases only arise on the order of once per decade, and then only following the Court's decision of the substantive question. "Ordinary standards" are beside the point, because qualifying cases are, by definition, extraordinary.

Cases where petitioners claim the second *Teague* exception are quite different from cases where they claim the first exception. As narrow as the first exception is, the second is "even more circumscribed." *O'Dell* v. *Netherland*, 521 U. S. 151, 157 (1997). While petitioner is correct that in first-exception cases retroactivity is obvious, qualification of post-1989 rules for the second exception is *never* obvious. Indeed, *amicus* believes that today it is nonexistent. This Court has never found a post-*Teague* rule to qualify, see *id.*, at 171 (Stevens, J., dissenting), and *Teague* itself expressed doubt on

the point. See 489 U. S., at 313. For the reasons discussed in part III, *infra*, *Cage* does not qualify.

Not only has this Court never found a post-*Teague* rule to qualify for the second exception, it has never mentioned as an example any rule newer than *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), decided 38 years ago. When Justice Stevens undertook to define "fundamental" rules, he did so by examples, and those cases were even older. See *Rose* v. *Lundy*, 455 U. S. 509, 544, nn. 9, 10, 11 (1982) (dissenting opinion) (citing *Moore* v. *Dempsey*, 261 U. S. 86 (1923); *Mooney* v. *Holohan*, 294 U. S. 103 (1935); *Brown* v. *Mississippi*, 297 U. S. 278 (1936)); accord, *Teague*, 489 U. S., at 313-314. This is not a coincidence. The more fundamental a rule is, the earlier in judicial history it was recognized. See *Teague*, *supra*, at 313-314. Those rules which are so fundamental that they qualify for the extremely stringent criteria of *Teague* were all made before *Teague*. Even if we assume, for the sake of argument, that a tiny handful of fundamental rules escaped being made in the criminal procedure revolution of the 1960s and 1970s, the number is surely so small that formally declaring their status would only be a minimal burden to this Court. So far, the record is zero in twelve years. If the Court maintains its proper, extremely narrow interpretation of the exception, once per decade would be a generous estimate.

Petitioner cites as a counterexample this Court's denial of an original habeas writ in *In re Smith*, 526 U. S. 1157 (1999). He contends that this denial illustrates that the Court would not consider it worthwhile to address a retroactivity question in the absence of a circuit split. See Brief for Petitioner 21, n. 9. He reads too much into a summary denial. It appears quite likely that the Court's denial was based in large part on procedural hurdles that would have precluded reaching the *Cage* issue. Among other problems, Smith's petition was time-barred unless the tolling provision of 28 U. S. C. § 2244(d)(2) applies to prior federal petitions. See Brief for United States as *Amicus Curiae* in *In re Smith*, No. 98-5804, pp. 17-18. At the time, there was

no circuit authority on this tolling question, see *id.*, at 18, and that issue needed to "percolate." It is now before this Court in *Duncan* v. *Walker*, No. 00-121.

In the present case, the Fifth Circuit did authorize a successive petition, and this Court therefore has certiorari jurisdiction to review its subsequent decision denying the petition. Cf. *Felker* v. *Turpin*, 518 U. S. 651, 657-658, 665 (1996) (motion for leave to file denied by Court of Appeals, no certiorari jurisdiction). Even though *Cage* has not yet been made retroactive by this Court, it could be in this case, if it really did meet the criteria for retroactivity. Reviewing courts generally apply the law as it exists at the time of review, and a lower court decision may be held in "error," or even "plain error," even though it was rendered in full accord with precedents in effect at the time. See *Johnson* v. *United States*, 520 U. S. 461, 467-468 (1997). Nothing in the language of the statute precludes this Court from making a rule retroactive in a successive petition case and reversing a court of appeals' decision, even if that decision was correct when rendered, *i.e.*, the rule had not then been made retroactive. However, if the present case establishes that the Fifth Circuit's interpretation of § 2244(b)(2)(A) is correct, then the courts of appeals will no longer grant leave to file for claims under rules not yet made retroactive by this Court, and this route will not be available in the future. This situation presents only minor practical problems.

Several other avenues are available for this Court to declare a rule retroactive on habeas corpus in the extremely rare event that such a declaration is necessary. One method is to make the rule on habeas corpus initially, as would have occurred in *Penry*, 492 U. S., at 330, if Penry had prevailed on the merits of his categorical exemption claim. Another route is to grant certiorari in a case where a habeas petitioner claims an exception in his first habeas petition. Petitioner complains that such a grant is unlikely when the courts of appeals are unanimous that a rule *is* retroactive. See Brief for Petitioner 20. This

situation with *Cage* was the unfortunate result of confusion between structural error and retroactivity. Before *Sullivan*, there were circuit decisions holding *Cage* not retroactive, see, *e.g.*, *Skelton* v. *Whitley*, 950 F. 2d 1037, 1045-1046 (CA5 1992), and the present case should clear up the confusion *Sullivan* generated. Between the extreme narrowness of the second *Teague* exception and the asymptotically decreasing "fundamentalness" of any rules remaining to be made, it is highly unlikely that any new rule will ever again be unanimously held retroactive under this exception. Even if that did happen, a rule that fundamental would *per se* be important enough for review under Supreme Court Rule 10(c). Summary affirmance remains available in the rare event that there is a special need to put this Court's imprimatur on a clearly correct decision of a lower court. See, *e.g.*, *Hildwin* v. *Florida*, 490 U. S. 638 (1989) (*per curiam*) (summarily affirming clearly correct state court decision). A summary affirmance is precedent for the essential elements of the judgment affirmed, see *Morse* v. *Republican Party of Va.*, 517 U. S. 186, 203, n. 21 (1996), which would typically include retroactivity of a rule applied on habeas corpus.

The final method, available on successive petitions, is an original petition in this Court. The " 'gatekeeping' system" of 28 U. S. C. § 2244(b)(3) does not apply, *Felker*, 518 U. S., at 662, but the substantive limitations at least "inform," if not bind, this Court's consideration of the petition. *Id.*, at 662-663. Original petitions are not the optimum way for issues to reach this Court, but, again, the number of retroactive rules is so extremely small that they would present little burden in the total workload of the Court.[3] A habeas petitioner who really did have such a fundamental claim under a rule that is new at this

3. Justice Stevens' concurring opinion in *Felker* lists two other possibilities: the All Writs Act and review of interlocutory orders. See 518 U. S., at 666. We do not rely on these as their status remains uncertain.

point in history would qualify under Supreme Court Rule 20.4(a), having both exceptional circumstances and an inability to obtain relief from other courts. Cf. *Felker*, *supra*, at 665.

In summary, *Cage* has not been made retroactive on collateral review "by the Supreme Court," which requires an express holding to that effect. The question is open for resolution in the present case, and we now turn to that question.

III. *Cage* does not qualify for the second *Teague* exception.

A. Retroactivity v. Harmless Error.

Petitioner maintains, and a number of courts of appeals have held, that *Sullivan* v. *Louisiana*, 508 U. S. 275 (1993) compels the conclusion that the rule of *Cage* v. *Louisiana*, 498 U. S. 39 (1990) (*per curiam*), disapproved in part in *Estelle* v. *McGuire*, 502 U. S. 62, 72, n. 4 (1991), qualifies for the second exception to the nonretroactivity rule of *Teague* v. *Lane*, 489 U. S. 288 (1989). Brief for Petitioner 24. This argument is a *non sequitur*. *Sullivan* addressed whether "*Cage* error" is susceptible to harmless-error analysis. 508 U. S., at 276. Retroactivity and harmless error are distinct questions and must be addressed separately.

Harmless error analysis and nonretroactivity both have the effect of denying relief to some defendants, despite an aspect of their trials that today would be recognized as constitutional error. The two doctrines therefore have some common aspects, and it is not surprising to see some similar language in the opinions. They also have significant differences, however. The classes of denied defendants are different, and the considerations that go into denying relief in a particular case are different.

A finding that a rule is not retroactive on collateral review cuts off relief from an entire class of defendants, *i.e.*, those whose convictions were final before the rule was made. There

is no individual consideration of whether observance of the rule would have made a difference in the particular case. The effect is temporary, however, as nonretroactivity has no effect on future cases. Harmless error is applied case by case, but it applies forever. *Arizona* v. *Fulminante*, 499 U. S. 279 (1991) applied harmless error analysis to a rule created half a century earlier in *Brown* v. *Mississippi*, 297 U. S. 278 (1936).

Nonretroactivity serves to limit the costs imposed by overturning final convictions based on new rules when those costs outweigh the benefits. See *Sawyer* v. *Smith*, 497 U. S. 227, 242-243 (1990). It is the nature of the judicial process that new rules can only be made in cases where they affect the outcome, see *Teague*, 489 U. S., at 315, and equal treatment demands that those similarly situated be treated the same. See *ibid.* However, the price of progress would be too great if every new rule required reexamination and possibly retrial of every case when the prior rule was applied. *Id.*, at 310. The focus is the *difference* in the law between two points in time. Is the cost of retrying cases, which were reasonably deemed properly tried under prior law, outweighed by the value of the additional protection of the new rule, *compared* to the protections available under prior law?

Harmless error has an altogether different basis. It seeks to achieve the just result in the individual case. While harmless error is also based on "social costs," see *Calderon* v. *Coleman*, 525 U. S. 141, 146 (1998) (*per curiam*), the cost-benefit analysis assesses whether the likelihood that the error made a difference in the particular case outweighs the cost of retrial. See *O'Neal* v. *McAninch*, 513 U. S. 432, 443 (1995) (balancing interests and risks). The relevant comparison is between what actually happened and what should have happened. The timing and magnitude of changes in the law are irrelevant. Nonretroactivity on habeas and eligibility for harmless error analysis are both the general rules, and the respective classes of exceptions are both small. They are, however, different classes and small for different reasons.

The jury discrimination cases establish unequivocally that the two classes are not the same. *Vasquez* v. *Hillery*, 474 U. S. 254 (1986) rejected the state's argument that racial discrimination in the selection of the grand jury could be harmless error when followed by a conviction by a properly selected trial jury. The main reason is that this "grave constitutional trespass" would have no effective remedy without reversal of the subsequent conviction. See *id.*, at 262. There is no case-by-case assessment to make. The choice is reverse all such cases or reverse none.

Certainly it cannot be said that this error renders the final result unreliable. States do not have to use grand juries at all, *Hurtado* v. *California*, 110 U. S. 516, 538 (1884), or even preliminary hearings. See *Lem Woon* v. *Oregon*, 229 U. S. 586, 589 (1913). The only argument the *Hillery* Court could make for *any* effect on the outcome was the discretion of the grand jury not to indict despite proof of guilt. See 474 U. S., at 263. To say that such an exercise of discretion was highly unlikely in the case of the brutal murder of a 15-year-old girl, see *id.*, at 267 (Powell, J., dissenting), would be an understatement. The "unfairness" that precludes harmless error analysis in racial discrimination cases is not a lack of confidence in the result but rather the denial of equal treatment based on race, contrary to the very core of the Fourteenth Amendment. Statements in other cases regarding structural error and reliability, see, *e.g.*, *Neder* v. *United States*, 527 U. S. 1, 8-9 (1999), must be considered with *Hillery* in mind. Some rules qualify for this small group because of their powerful impact on reliability, but others qualify for other reasons. Another example is the right of self-representation, see *id.*, at 8, the exercise of which rarely improves the defendant's chances of acquittal. See *Martinez* v. *Court of Appeal*, 528 U. S. 152, 161 (2000); see also *Morris* v. *Mathews*, 475 U. S. 237, 244-245 (1986) (retrial for jeopardy-barred offense "not in any sense harmless," even though conviction reduced to non-barred offense); cf. *Caspari* v. *Bohlen*, 510 U. S. 383, 396 (1994) (extension of Double

Jeopardy Clause to noncapital sentencing not within second *Teague* exception).

If structural errors were necessarily *Teague* exceptions, then all jury discrimination rules would be retroactive on habeas corpus. The definitive counterexample is *Teague* itself. Teague objected at trial to the prosecutor's use of peremptory challenges, allegedly in a racially discriminatory manner. *Teague*, 489 U. S., at 293. This claim would later be recognized in *Batson* v. *Kentucky*, 476 U. S. 79, 97-98 (1986), but was held nonretroactive on habeas in *Allen* v. *Hardy*, 478 U. S. 255 (1986) (*per curiam*). See *Teague*, *supra*, at 294. The *Teague* Court would not reconsider *Allen* v. *Hardy*, *id.*, at 296, and it held that creation of a rule equivalent to *Batson* under the Sixth Amendment instead of the Equal Protection Clause would be a nonretroactive new rule. *Id.*, at 299 (plurality opinion). The dissent asserted *Hillery* for the proposition that Teague's proposed rule qualified for the second exception based on its "far graver impact on the fundamental fairness of a petitioner's trial than the discrimination we condemned in *Hillery* . . . ." *Id.*, at 344 (opinion of Brennan, J.). The *Hillery* argument is implicitly rejected by the plurality, which held that the error in question "does not undermine the fundamental fairness that must underlie a conviction." *Id.*, at 315; see *Clemons* v. *Mississippi*, 494 U. S. 738, 747-748, n. 3 (1990) (argument made in dissent deemed implicitly rejected by majority).

Conversely, coerced confessions are not structural error, see *Arizona* v. *Fulminante*, 499 U. S., at 310, even though the rule against them is fundamental for *Teague* purposes. See *Teague*, 489 U. S., at 313. To be sure, a few rules are both structural error and *Teague* exceptions by reason of their powerful *and* unassessable impact on the reliability of the outcome. The paradigm is, of course, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). See *Neder*, 527 U. S., at 8 (structural error); *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990) (*Teague* exception). The set of rules that qualify for the *Teague* exception and the set that are "structural error" are intersecting sets, neither being a subset

of the other. Hence, membership in one does not determine membership in the other. The fact that "*Cage* error" is "structural" does not tell us whether *Cage* is retroactive on habeas.

B. Cage and the Second Exception.

Most rules of criminal procedure enhance the accuracy of the proceeding. That is usually why they are made in the first place.[4] The fact that a rule has this effect is not enough to make it retroactive on habeas corpus. The exception is reserved for "watershed rules of fundamental fairness." *Sawyer*, 497 U. S., at 242. The rule must be "*essential* to the accuracy and fairness of the criminal process," *id.*, at 243 (emphasis added), rather than merely enhancing accuracy. Cf. *id.*, at 242.

"Watershed" means, in its figurative sense, a "critical point that marks a division or a change of course; a turning point . . . ." American Heritage Dictionary 2019 (3d ed. 1992). Rules that enhance or add an additional layer of protection to existing rules do not qualify. The rule in question must *be* the bedrock rule, with "the primacy and centrality of the rule adopted in *Gideon* . . . ." *Saffle*, 494 U. S., at 495.

Sawyer, *supra*, has the most detailed discussion of the exception to date, and the case illustrates the incremental versus watershed distinction. *Sawyer* involved the retroactivity of the rule of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) regarding prosecutor arguments which diminish the jury's sense of responsibility. See *Sawyer*, 497 U. S., at 232. Before *Caldwell*, "the rule of *Donnelly* [v. *De Christoforo*, 416 U. S. 637 (1974)] was in place to protect any defendant who could show that a prosecutor's remarks had in fact made a proceeding fundamentally unfair." *Id.*, at 243. *Caldwell* provided "an additional

4. The principal contra-accuracy rule has been virtually banned from habeas corpus. See *Stone* v. *Powell*, 428 U. S. 465, 490-491 (1976).

measure of protection." *Id.*, at 244. This incremental protection had value, but it did not qualify for the exception. *Ibid.*

Stovall v. *Denno*, 388 U. S. 293 (1967) provides another illuminating example, even though it comes from the pre-*Teague* era. Since *Teague* was a sharp curtailment of habeas retroactivity, see *Teague*, 489 U. S., at 327 (Brennan, J., dissenting), it follows that rules that were not retroactive under the prior body of law would not qualify for the second *Teague* exception. *Stovall* addressed the retroactivity of new rules regarding the right to counsel at pretrial identifications. See 388 U. S., at 294; *United States* v. *Wade*, 388 U. S. 218, 226-227 (1967); *Gilbert* v. *California*, 388 U. S. 263 (1967). Even though the *Wade* and *Gilbert* rules were "justified by the need to assure the integrity and reliability of our system of justice," *Stovall*, *supra*, at 299, they were not retroactive, for two reasons. First, although injustices were possible in cases not conforming to these rules, the number of cases where no unfairness or injustice resulted was also large, much more so than in cases where counsel was denied on trial or appeal. See *ibid.* Second, a defendant whose pretrial confrontation was truly unfair could fall back on pre-*Wade* due process requirements.

The base right to counsel is, as noted *supra*, the paradigm of a rule qualifying for the second *Teague* exception. Yet an extension of that rule to the critical stage of a pretrial identification was not retroactive. *Gideon* was a watershed rule. *Wade*'s enhancement of *Gideon* was not.

The watershed rule involved in the present case is *In re Winship*, 397 U. S. 358 (1970). *Winship* elevated to "constitutional stature" the requirement of proof beyond a reasonable doubt in criminal cases. *Id.*, at 364. That rule had been universally followed in adult criminal cases before *Winship*, see *id.*, at 361, but *Winship* made it a federal constitutional right.

In 1978, before the decision of petitioner's direct appeal, *Taylor* v. *Kentucky*, 436 U. S. 478 (1978) established that some

level of constitutional protection existed for jury instructions in this area. The actual holding of *Taylor* involved the presumption of innocence, *id.*, at 490, but the truncated, unclear, and confusing reasonable doubt instruction was a factor in the decision. See *id.*, at 488; see also *id.*, at 486, n. 13 (relation of presumption of innocence to proof beyond a reasonable doubt).

On this foundation, *Cage* v. *Louisiana*, 498 U. S. 39 (1990) (*per curiam*), decided that the instruction used in that case was "contrary to the reasonable doubt requirement articulated in *Winship*." *Id.*, at 41; see also *id.*, at 41, n. * (citing, *inter alia*, *Taylor*). While this holding was not dictated by precedent, and hence "new," it was hardly a "watershed rule." The basic right had been established. Instructions were already subject to scrutiny under this requirement. *Cage* was a fairly routine case about whether a general principle should be extended to invalidate a particular practice. It was a question of law and not a "mixed question," making *Teague* analysis of *Cage* like *Butler* v. *McKellar*, 494 U. S. 407, 414-415 (1990), and unlike *Wright* v. *West*, 505 U. S. 277, 306 (1992) (Kennedy, J., concurring in the judgment), but there is no "watershed" quality about it.

Before *Cage*, all defendants were entitled to instructions on the presumption of innocence and the standard of proof beyond a reasonable doubt. After *Cage*, it was established that the particular instruction in Cage's case was not sufficient. Four years later, it was established that another instruction with only a few differences *did* meet constitutional minimums. See *Victor* v. *Nebraska*, 511 U. S. 1, 19-22 (1994). Under the analysis of *Sawyer*, the question is whether the incremental change that *Cage* made was of the fundamental character needed to override the usual rule of nonretroactivity. The answer, *amicus* submits, is clearly no. This is fine-tuning.

This brings us back to *Sullivan* v. *Louisiana*, *supra*. The fact that *Sullivan* held that *Cage* error was not susceptible to harmless error analysis does not, by itself, require the conclusion that it also qualifies for the second *Teague* exception. Its

discussion of *Cage* does shed some light, though. The reasons for *Sullivan*'s holding do not apply to retroactivity.

Sullivan begins and ends its analysis by citing *Duncan* v. *Louisiana*, 391 U. S. 145 (1968) for the importance of having the jury rather than judges make the finding of guilt. *Sullivan*, 508 U. S., at 277, 281. Yet *Duncan* was not retroactive. "The values implemented by the right to jury trial would not reasonably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." *De Stefano* v. *Woods*, 392 U. S. 631, 634 (1968) (*per curiam*). Having the judge rather than the jury decide is not inherently unfair in the sense of creating a danger of wholesale convictions of innocent persons, see *id.*, at 633-634, but rather is inconsistent with " 'a profound judgment about the way in which law should be enforced and justice administered.' " *Sullivan*, *supra*, at 281 (quoting *Duncan*).

Rose v. *Clark*, 478 U. S. 570, 577 (1986) described some structural errors as those without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . ." *Sullivan* quoted this description. See 508 U. S., at 281. But this passage of *Rose* does not deal with jury trial. That issue is addressed in the next paragraph. There, *Rose* says that jury trial is structural because, regardless of how reliable the result may be, "the error in such a case is that the wrong entity judged the defendant guilty." 478 U. S., at 578. *Sullivan* also quotes and relies on this statement. 508 U. S., at 281. See also *Neder*, 527 U. S., at 38 (Scalia, J., dissenting) (*Sullivan* based on allocation, not accuracy, of decision).

Sullivan follows the same line as *Vasquez* v. *Hillery* and the rule that denial of self-representation cannot be harmless. See *McKaskle* v. *Wiggins*, 465 U. S. 168, 177, n. 8 (1984). No matter how strong our confidence in the accuracy of the trial's result may be, the error is not harmless because the rule in question has a purpose independent of insuring accuracy. For appellate judges to make their own finding about the evidence in the individual case under harmless error analysis would

compound rather than cure the error. See *Sullivan*, *supra*, at 280.

Conspicuous by its absence from *Sullivan* is any discussion of how or how much *Cage* changed the law from what it had been before *Cage*. Such an inquiry is central to retroactivity and irrelevant to harmless error. Indeed, the only discussion in *Sullivan* of the specific rule in *Cage*, as opposed to the general reasonable doubt and jury trial requirements, is in the footnote. See 508 U. S., at 278, n. *. That footnote reserves the question of whether *Cage* is even *correct* after *Boyde* v. *California*, 494 U. S. 370, 380 (1990) and *Estelle* v. *McGuire*, 502 U. S. 62, 72-73, n. 4 (1991). It would be more than a little strange to say that a case establishes an "absolute prerequisite to fundamental fairness," see *Teague*, 489 U. S., at 314, but then again it might be wrong.

Tyler, Cage, Victor, and Sandoval were all convicted by juries who were instructed that they had to find guilt proven beyond a reasonable doubt. See *Victor*, 511 U. S., at 7 (Sandoval, California instruction); *id.*, at 18 (Victor, Nebraska instruction). All four therefore received the protection of the bedrock procedural element established in *Winship*. In *Cage*, the actual implementation of that element fell a little short of the line. In *Victor* the implementation cleared the line. See *id.*, at 21-22. The instruction in the present case lies in between. It contains the "abiding conviction" language that *Victor* found helpful, but not the other clarifying elements of the Nebraska instruction. Compare *id.*, at 21, with *supra*, at 2-3. These line-drawing exercises on the ragged edges of constitutional doctrine are important and need to be done, but they have "none of the primacy and centrality of . . . *Gideon*." See *supra*, at 24. What is the probability that an innocent person was convicted because his jury got the *Cage* instruction, but the jury would have acquitted him if they had received the *Victor* instruction instead? *Amicus* submits it is small.

Cage v. *Louisiana* prompted an improvement in criminal justice, forcing courts and legislatures to revise and improve

instructions long in need of revision. That is a highly desirable result. The cost of progress, however, need not include retrial of every case tried under instructions which were considered entirely proper for many years. That cost is only justified for rules such as *Gideon*, where the improvement of a single step is so large and dramatic that substantial numbers of innocent people may be left in prison if full retroactivity is not extended to them. The rule of *Cage* v. *Louisiana* is not such a rule.

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit should be affirmed.

February, 2001

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

MELVIN TYLER, *Petitioner,*

v.

BURL CAIN, WARDEN, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, ALASKA, COLORADO, DELAWARE, FLORIDA, ILLINOIS, IOWA, KANSAS, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NEW YORK, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT AND VIRGINIA IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

In *Cage v. Louisiana*, 498 U.S. 39 (1990), this Court held that a Louisiana reasonable doubt instruction did not comply with the constitution. In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court held that *Cage* error is a structural defect in a trial. Is the rule in *Cage*, as well as any other rule identifying a new structural defect, a watershed rule of criminal procedure exempt from the general prohibition on the retroactive application of new rules of criminal procedure to cases on collateral review in federal court under *Teague v. Lane*, 489 U.S. 288 (1989)?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 00-5961

MELVIN TYLER, *Petitioner,*

v.

BURL CAIN, WARDEN, *Respondent.*

INTEREST OF AMICI CURIAE

All decisions of this Court concerning habeas corpus applications filed pursuant to Section 2254 of Title 28 of the United States Code are of interest to Amici, as Amici are responsible for defending presumptively valid state court judgments against federal habeas corpus challenges. Petitioner's argument in this case would substantially broaden the scope of the exceptions to the rule against the retroactive application of "new rules" of criminal procedure in section 2254 cases, and would thereby undermine important interests of comity and finality. Amici's interests will therefore be substantially affected by the resolution of this issue. This brief is submitted in support of Respondent by Amici through their Attorneys General in accordance with Rule 37.4 of the Rules of the Supreme Court of the United States.

SUMMARY OF ARGUMENT

Under *Teague v. Lane*, 489 U.S. 288 (1989), a state convict seeking federal collateral relief may not take advantage of "new rules" of criminal procedure. One of the two exceptions to this

anti-retroactivity doctrine, the one at issue here, is for "watershed rules" of criminal procedure. Petitioner proposes that all new rules identifying errors that would be deemed "structural", and therefore exempt from normal harmless-error review, are necessarily watershed rules of criminal procedure. Amici submit that, because there are important and functional distinctions between watershed rules of criminal procedure and rules identifying structural defects, this Court should reject Petitioner's proposal that the two concepts be conflated.

The issue of the connection, if any, between "structural" defects and "watershed" rules in this case arises from two decisions of this Court regarding the need to instruct the jury on the prosecution's burden of proof "beyond a reasonable doubt." In *Cage v. Louisiana*, 498 U.S. 39 (1990), this Court held that a Louisiana reasonable-doubt instruction did not comply with the federal constitution. In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court ruled that giving the instruction constituted a structural defect in the trial, so that a defendant need make no showing of prejudice to gain relief. Petitioner argues *Sullivan's* identification of *Cage* error as a structural defect compels the conclusion that the rule identifying such error is a watershed rule of criminal procedure.

Petitioner's retroactivity argument is based upon a flawed premise. Cases identifying structural defects are analytically distinct from those identifying watershed rules of criminal procedure. Structural defects are principally identifiable as errors for which no specific prejudice need be shown before relief becomes available due to the practical difficulty of assessing prejudice from such errors. Watershed rules, by contrast, must both greatly promote accuracy and alter our understanding of some bedrock principle; and violation of such rules may be amenable to harmless error analysis. Classifying an error as "structural" for harmless-error purposes need neither promote accuracy, nor alter our understanding of some bedrock principle of criminal procedure.

A decision equating rules identifying structural defects

with watershed rules of criminal procedure would impose a large burden on the States. The lower federal courts have identified at least twenty-nine types of errors in criminal cases as structural defects, with the Ninth Circuit Court of Appeals alone having identified eleven. This large new group of rules clearly exceeds what this Court contemplated in *Teague* when it stated that only a small core of rules, most of which had already been discovered, would fall within the watershed rule exception. Further, an examination of many of the rules reveals that they do not rise to the level of importance this Court was contemplating when it announced the watershed-rule exception in *Teague*.

The instant case provides an excellent example of a structural error that does not fulfill this Court's definition of a watershed rule of criminal procedure. *Cage* and *Sullivan* proceed from established and uncontroversial principles of law. While the precise holdings of the cases were not dictated by precedent, neither *Cage* nor *Sullivan* altered the underlying principles they were based upon. This Court's explanation of its holdings in those decisions undermines any claim that the decisions intended to, or in fact did, alter our understanding of the bedrock principles fundamental to the integrity of a criminal trial.

That the rule alters our understanding of some bedrock principle is an essential component of a watershed rule of criminal procedure. Both Petitioner's argument and the cases upon which he relies either misunderstand or simply ignore this requirement. For this reason, they erroneously conclude that *Cage* and *Sullivan* announced watershed rules of criminal procedure.

ARGUMENT

RULES IDENTIFYING STRUCTURAL DEFECTS ARE DIFFERENT FROM WATERSHED RULES OF CRIMINAL PROCEDURE

Petitioner asserts that all "structural defects," as defined in *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991), are "watershed rules of criminal procedure" within the meaning of *Teague v. Lane*, 489 U.S. at 310. (Brief for Pet'r at 25.) Petitioner notes that in *Sullivan v. Louisiana*, 508 U.S. at 279-83, this Court held that (mis)instructing the jury on reasonable doubt with the instruction condemned in *Cage v. Louisiana*, 498 U.S. 39 , is a structural defect. (Brief for Pet'r at 24.)[1/] Thus, Petitioner automatically concludes, *Teague* does not bar application of the *Cage* rule to his collateral review case. Petitioner's argument, if adopted, would exempt all structural defects from *Teague's* sweeping prohibition on the retroactive application of new rules of criminal procedure to cases on collateral review. (Brief for Pet'r at 28.)

Rules identifying "structural defects" and "watershed rules of criminal procedure," however, are distinct. The language this Court has used to describe the concepts demonstrates that they are not, as Petitioner asserts, "essentially identical." (Brief for Pet'r at 25.) The bases for these two rules are analytically distinct, and the rules serve different purposes. Further, the liberality with which the circuit courts have identified new structural defects militates against conflating the two doctrines. In this case, a proper analysis of *Cage* and *Sullivan* reveals they

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1. Amici note that the basis for this Court's conclusion in *Cage* (though not the holding) was expressly overruled in *Estelle v. McGuire*, 502 U.S. 62 (1991). The case articulating the current "rule" for analyzing claims of erroneous reasonable doubt instructions is *Victor v. Nebraska*, 511 U.S. 1 (1994). Accordingly, unless Petitioner can demonstrate the instant case is factually identical to *Cage*, it is the rule in *Victor* which would control, to the extent any such rule should be given retroactive effect.

do not fit the definition of a watershed rule of criminal procedure.

INTRODUCTION

I.

THE "WATERSHED RULES OF CRIMINAL PROCEDURE" EXCEPTION IN *TEAGUE V. LANE*

Recognizing the importance of finality and comity to our criminal justice system, a plurality of this Court has held that state prisoners seeking federal collateral relief from their convictions may not base their claims upon new constitutional rules of criminal procedure. *Teague v. Lane*, 489 U.S. at 310. In deference to state-court judgments, this Court allowed only two narrow exceptions to its non-retroactivity doctrine.

The first exception involves the rare instance in which a new rule places "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague*, 489 U.S. at 307, quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part, dissenting in part). This exception has no application to the instant case.

The second, "even more circumscribed," exception is for "watershed rules of criminal procedure . . . ." *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997), citing *Teague*, 489 U.S. at 311. In defining what constitutes a "watershed rule," *Teague* combined two concepts developed by Justice Harlan; the first in his concurring and dissenting opinion in *Mackey*, 401 U.S. 667, the other in his dissenting opinion in *Desist v. United States*, 394 U.S. 244 (1969).

From *Mackey*, this Court incorporated the principle that retroactive application should be afforded to those rules that "'are "implicit in the concept of ordered liberty . . . ."' [Such

rules] properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." *Teague*, 489 U.S. at 311, quoting *Mackey*, 401 U.S. at 693. From *Desist*, this Court extracted the principle that "'"new" constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas.'" *Teague*, 489 U.S. at 312, quoting *Desist*, 394 U.S. at 262. These two concepts, taken together, define the "watershed rule" exception to *Teague's* prohibition on the retroactive application of new rules. 489 U.S. at 312; *Sawyer v. Smith*, 497 U.S. 227, 229 (1990).

Teague suggested the historic stature of watershed rules:

> [S]uch rules are "best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus - that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods."

489 U.S. at 313, quoting *Rose v. Lundy*, 455 U.S. 509, 544 (1982) (Stevens, J., dissenting). *Teague* specifically referred to the discussion in *Mackey* regarding the right to counsel at trial. 489 U.S., at 311-12. This Court has subsequently reiterated that the rule in *Gideon v. Wainwright*, 372 U.S. 335 (1963), is the "paradigmatic example of a watershed rule of criminal procedure." *Gray v. Netherland*, 518 U.S. 152, 170 (1996), citing *Saffle v. Parks*, 494 U.S. 484, 495 (1990).

While "the precise contours of this exception may be difficult to discern," *Saffle v. Parks*, 494 U.S. at 495, the watershed rule exception "is clearly meant to apply only to a small core of rules . . . ." *Graham v. Collins*, 506 U.S. 461, 478 (1993). *Teague* cautioned that it is "unlikely that many such components of basic due process have yet to emerge." 489 U.S. at 313.

Since *Teague*, this Court has identified no previously unknown watershed rules of criminal procedure. See *O'Dell v. Netherland*, 521 U.S. at 167; *Lambrix v. Singletary*, 520 U.S. 518, 539-40 (1997); *Gray v. Netherland*, 518 U.S. at 170; *Goeke v. Branch*, 514 U.S. 115, 120 (1995); *Caspari v. Bohlen*, 510 U.S. 383, 396 (1994); *Gilmore v. Taylor*, 508 U.S. 333, 345 (1993); *Graham v. Collins*, 506 U.S. at 477-78; *Sawyer v. Smith*, 497 U.S. at 241-45; *Saffle v. Parks*; 494 U.S. at 495; *Butler v. McKellar*, 494 U.S. 407, 411 (1990).

II.

STRUCTURAL DEFECTS AS DEFINED IN *ARIZONA V. FULMINANTE*

In *Arizona v. Fulminante*, 499 U.S. at 307-09, this Court held that there are two basic types of error that might affect a criminal trial: "'trial error' – error which occurred during the presentation of the case to the jury," and "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards."

The nature of structural errors is such that it is impossible to meaningfully assess their prejudicial effect. *Fulminante*, 499 U.S. at 309. Accordingly, this Court held that once structural error has been found, a conviction can be reversed without any additional showing of prejudice. *Fulminante*, 499 U.S. at 309-10.

This Court has identified a number of specific structural defects: a biased trial judge (*Tumey v. Ohio*, 273 U.S. 510 (1927)); denial of a public trial (*Waller v. Georgia*, 467 U.S. 39 (1984)); denial of the right to self-representation (*McKaskle v. Wiggins*, 465 U.S. 168 (1984)); and racial discrimination in selection of a grand jury (*Vasquez v. Hillery*, 474 U.S. 254 (1986)). *See Neder v. United States*, 527 U.S. 1, 8 (1999) Further, this Court has held that the denial of the right to have

a district judge (rather than a magistrate judge) preside over jury selection is a structural defect. *Gomez v. United States*, 490 U.S. 858, 876 (1989).

Finally (and most important for the purposes of the instant case), this Court held in *Sullivan v. Louisiana*, 508 U.S. 275, that a jury instruction that diluted the burden of proof to below "beyond a reasonable doubt" was a structural defect in the trial and thus not amenable to harmless error analysis.

III.

WATERSHED RULES AND RULES CORRECTING STRUCTURAL DEFECTS ARE NOT IDENTICAL

A comparison of this Court's discussions regarding rules identifying structural defects and watershed rules of criminal procedure reveals that they cannot be rationally characterized as "identical."

The test for determining whether a rule should be considered watershed is in two parts: whether the new rule significantly enhances the accuracy of trials, and whether the new rule alters our understanding of the bedrock principles upon which trials are conducted. *Teague*, 489 U.S. at 311-12. Structural defects, by contrast, are defined primarily by their amenability to harmless error analysis. *Fulminante*, 499 U.S. at 309. These categories are not mutually exclusive. However, there are rules that clearly fulfill one definition or the other, but not both.

A misreading of *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993), might have caused Petitioner, and several circuit courts, to inappropriately conflate the concepts of a watershed rule and a rule identifying a structural defect. In *Abrahamson*, 507 U.S. at 629-30, this Court stated that denial of counsel under *Gideon v. Wainwright*, 372 U.S. 335, was a structural defect. As previously noted, this Court has repeatedly held out

Gideon as the paradigmatic example of a watershed rule of criminal procedure. *Gray v. Netherland*, 518 U.S. at 170, *Saffle v. Parks*, 494 U.S. at 495, *Teague*, 489 U.S. at 311-12 That it is also a structural defect might have tempted Petitioner and the circuit courts to indulge in a classically flawed syllogism: that because at least one rule fulfills both definitions, all rules fulfilling either definition necessarily fulfill both.

The flaw in this reasoning is revealed by another example this Court identified as illustrative of a watershed rule: a "conviction . . . based on a confession extorted from the defendant by brutal methods." *Teague*, 489 U.S. at 313. In *Fulminante*, however, this Court specifically held that admission of a coerced confession is trial error, subject to harmless error analysis. 499 U.S. at 310. *Fulminante* and *Teague* thus compel the conclusion that a watershed rule of criminal procedure can contemplate "trial" rather than "structural" error.

Other cases identify structural defects that would fail to fulfill the criteria defining watershed rules. In *Neder v. United States*, 527 U.S. at 8, citing *McKaskle v. Wiggins*, 465 U.S. at 177, this Court held that denial of the right of self-representation is a structural error. However, *McKaskle's* rejection of the application of harmless-error analysis to the denial of the right of self-representation was explicitly predicated upon the recognition that self-representation rendered the trial *less* accurate: "Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis." *McKaskle*, 465 U.S. at 177 n.8. Accordingly, the rule discussed in *McKaskle* fails the first prong of the *Teague* test for watershed rules: that they "significantly improve the pre-existing fact-finding procedures." *Teague*, 489 U.S. at 312. This structural defect thus clearly would fail the watershed rule analysis.

In *Teague*, this Court articulated very clear criteria for

determining whether a rule should be considered watershed. In *Fulminante*, this Court articulated very clear criteria for determining whether a defect should be considered structural. Those criteria are different. Petitioner's argument is based upon the fundamentally flawed premise that the criteria for identifying structural defects and those for watershed rules of criminal procedure are "essentially identical." As demonstrated above, they are not. Accordingly, Petitioner's argument should be rejected.

IV.

HOLDING THAT ALL RULES IDENTIFYING STRUCTURAL DEFECTS ARE WATERSHED RULES OF CRIMINAL PROCEDURE WOULD IMPOSE AN UNDUE BURDEN ON THE STATES

Additionally, this Court should refrain from conflating rules identifying structural defects with watershed rules of criminal procedure because to do so would greatly and unjustifiably burden the States. This Court has held that there are only a "small core of rules" that qualify as watershed rules of criminal procedure. *Graham v. Collins*, 506 U.S. at 478 . Further, *Teague* stated that it is "unlikely that many such components of due process have yet to emerge." 489 U.S. at 313. If Petitioner's analysis were adopted, however, there would be recognized in the federal courts no less than twenty-nine new primary and central procedures implicit in the concept of ordered liberty that properly alter our understanding of the bedrock procedural elements fundamental to the integrity of a criminal proceeding. *Teague*, 489 U.S. at 307, 311; *Sawyer v. Smith*, 497 U.S. at 229; *Saffle v. Parks*, 494 U.S. at 495. Such a result is plainly inconsistent with the cautionary language in *Teague*, and must therefore be avoided.

Lower federal courts, unfettered by the strong language from *Teague* regarding the paucity of undiscovered watershed rules of criminal procedure, have purported to identify at least twenty-nine structural defects,[2] all of which would be exalted to the status of watershed rules of criminal procedure should this Court adopt Petitioner's proposed rule.

Among those rules are many which seem to be most unlikely candidates for the small core of watershed rules. In *United States v. Ramos Torres*, 187 F.3d at 914, the Eighth Circuit held that instructing the jury on a count that was dismissed was a structural defect. In *United States v. McFerron*, 163 F.3d 956, the Sixth Circuit held that erroneously denying a defendant's exercise of a peremptory challenge was a structural defect. In *Dyer v. Calderon* , 151 F.3d at 973-79 the Ninth Circuit held it was a structural defect to seat a juror who had misled the court regarding her experiences as the relative of a murder victim. In *Mach v. Stewart*, 137 F.3d at 633-34, the Ninth Circuit held that it was a structural defect in a sexual

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2. *United States v. Ramos Torres*, 187 F.3d 909, 914 (8th Cir.) *cert. denied*, 528 U.S. 1055 (1999); *United States v. McFerron*, 163 F.3d 952, 956 (6th Cir. 1998); *McGurk v. Stenberg*, 163 F.3d 470, 474-75 (8th Cir. 1998); *Henderson v. Frank*, 155 F.3d 159, 171 (3d Cir. 1998); *Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998); *Mach v. Stewart*, 137 F.3d 630, 633-34 (9th Cir. 1997); *Tankleff v. Senkowski*, 135 F.3d 235, 240 (2d Cir.1998); *United States v. Hay*, 122 F.3d 1233, 1236 (9th Cir. 1997); *Mejia-Paiz v. INS*, 111 F.3d 720, 727 (9th Cir. 1997); *United States v. Noushfar*, 78 F.3d 1442, 1445 (9th Cir. 1996); *United States v. DiRico*, 78 F.3d 732, 737-38 (1st Cir. 1996); *Myers v. Johnson*, 76 F.3d 1330, 1338 (5th Cir. 1996); *United States v. Johnson*, 71 F.3d 139, 144 (4th Cir. 1995); *Harmon v. Marshall*, 69 F.3d 963, 966 (9th Cir. 1995); *Ford v. Norris*, 67 F.3d 162, 170 (8th Cir. 1995); *United States v. Salemo*, 61 F.3d 214, 221-22 (3d Cir.1995); *Riley v. Deeds*, 56 F.3d 1117, 1121 (9th Cir.1995); *United States v. Mohammad*, 53 F.3d 1426, 1438-39 (7th Cir.1995); *Bland v. California Dep't of Corrections*, 20 F.3d 1469, 1478 (9th Cir. 1994); *United States v. Colon-Pagan*, 1 F.3d 80, 81 (1st Cir. 1993); *Suniga v. Bunnell*, 998 F.2d 664, 670 (9th Cir.1993); *Hays v. Arave*, 977 F.2d 475, 479-80 (9th Cir.1992); *Guam v. Marquez*, 963 F.2d 1311, 1315 (9th Cir.1992); *Johnson v. Armontrout*, 961 F.2d 748, 756 (8th Cir. 1992); *Delgado v. Rice*, 67 F. Supp. 2d 1148, 1166 (C.D.Cal. 1999); *Smalls v. Batista*, 6 F.Supp.2d 211, 222-23 (S.D.N.Y. 1998); *Wilkins v. Bowersox*, 933 F.Supp. 1496, 1524 (W.D. Mo. 1996); *Oses v. Massachusetts*, 775 F. Supp. 443, 458-59 (D. Mass. 1991).

assault trial when, during voir dire, the venire heard a prospective juror say several times, in response to questions put to her, that in her experience as a social worker sexual assault had been confirmed every time there had been a complaint. In *United States v. Noushfar*, 78 F.3d at 1444, the Ninth Circuit held that allowing a jury to review tapes that had not been played in open court was a structural defect. In *Bland v. California Dep't of Corrections*, 20 F.3d at 1478, the Ninth Circuit held that a trial court's failure to exercise its discretion and inquire into the basis for a defendant's desire to substitute counsel was a structural defect. While the defects identified by the lower courts as structural involve matters that might have been of importance to those cases, it is an exaggeration to state that rules correcting those defects are fundamental to ordered liberty.

This Court has recognized that limits on the exercise of federal habeas corpus relief to state prisoners are necessary to avoid "profound societal costs." *Calderon v. Thompson*, 523 U.S. 538, 539 (1998). This limitation is based upon the States' compelling interest in the finality of convictions. "Finality is essential to the criminal law's retributive and deterrent functions ...." *Id.* "Only with an assurance of real finality can the State execute its moral judgment and can victims of crime move forward knowing the moral judgment will be carried out. Unsettling these expectations inflicts a profound injury to the powerful and legitimate interest in punishing the guilty." *Id.* (internal quotes omitted).

These interests would be poorly served if this Court were to issue a ruling forcing the States to give full retroactive effect to all of the rules involving errors identified by the lower courts as "structural." Further, those rules would then necessarily become available to post-finality prisoners, (and, depending upon the disposition of the first issue presented in the instant case, regardless of the number of previous federal petitions filed). Petitioner's proposed rule would thus fundamentally undermine *Teague* itself, by creating a broad new category of

rules which must be given retroactive effect.

Elevating the status of rules identifying structural defects to the equivalent of watershed rules of criminal procedure would have profound consequences on the administration of justice. The sheer number of new watershed rules which would be created is fundamentally inconsistent with the notion in *Teague* that there are only a small core of such rules, few, if any, of which have yet to emerge. Accordingly, this Court should refrain from characterizing rules identifying structural defects and watershed rules of criminal procedure as identical.

V.

THIS COURT'S DECISIONS IN *SULLIVAN V. LOUISIANA* AND *CAGE V. LOUISIANA* IDENTIFIED A STRUCTURAL DEFECT THAT DID NOT ALTER OUR UNDERSTANDING OF THE BEDROCK PROCEDURAL ELEMENTS ESSENTIAL TO A FAIR TRIAL

Petitioner says he can demonstrate that the decision in *Cage v. Louisiana* is a "new rule" under *Teague* and involves a structural defect under *Fulminante*. Thus, he contends, the decision in *Cage* must necessarily be a watershed rule of criminal procedure exempt from *Teague's* general non-retroactivity doctrine. Petitioner's argument, at best, overlooks an essential element of the test for a watershed rule: such a rule must alter our understanding of the bedrock principles essential to a fair trial. Because that element is missing not only from petitioner's analysis, but also from the rule articulated in *Cage*, it cannot be considered a watershed rule.

Cage held that an instruction equating reasonable doubt with "grave uncertainty" and "actual substantial doubt," when coupled with the requirement of "moral certainty,"

misdescribed reasonable doubt. 498 U.S. at 40. *Sullivan* held that use of the instruction condemned in *Cage* constituted a structural defect in the trial. *Sullivan*, 508 U.S. at 282.

Petitioner argues that *Cage* and *Sullivan* promote the accuracy and fairness of trials. Because an impact on accuracy and fairness is also necessary to finding a rule to be "watershed," Petitioner concludes that *Sullivan's* holding that *Cage* identified a structural error compels the conclusion that *Sullivan* and *Cage* announced a watershed rule.

Petitioner's analysis, however, essentially ends there. While Petitioner acknowledges the "fundamental fairness" prong of the watershed rule analysis, he misunderstands its place in the analysis. The question is not whether the rule simply involves an issue affecting "fundamental fairness"; the new rule must also "alter[s] our understanding of the bedrock principles" essential to fundamental fairness. While the criticism of the reasonable doubt instruction at issue in *Cage* and *Sullivan* is predicated upon an important constitutional concern, it is overstating the holdings in those cases to claim that they have somehow altered our understanding of whether it is necessary to properly instruct juries on the principle of reasonable doubt. That principle was well-established long before *Cage* and *Sullivan*. *Jackson v. Virginia*, 443 U.S. 307, 320 n.14 (1979); *In re Winship*, 397 U.S. 358 (1970).

This Court stated in *Cage*, "The issue before us is whether the reasonable-doubt instruction in this case complied with *Winship*." 498 U.S. at 40. Amici here do not dispute that the ruling in *Cage* - that the instruction in question did not comply with *Winship* - was not "dictated by precedent," in the sense that all reasonable judges would have agreed that the rule was "compelled" by pre-existing law, and thus *Cage* should be considered a "new rule" within the meaning of *Teague*. *Saffle v. Parks*, 494 U.S. at 488. However, the bedrock principle underlying *Cage* was in no way altered. Before *Cage*, it was essential that juries be properly instructed on reasonable doubt. *Cage* did nothing to alter our understanding of that principle.

Cage's own articulation of the question demonstrates this. The issue presented was not whether the reasonable doubt instruction comported with fundamental constitutional concerns previously unexplored by this Court. Rather, it was simply a question of whether particular language in a particular instruction complied with the principle articulated in *Winship* twenty years earlier. *Cage*, 498 U.S. at 40.

Put simply, the bedrock principle prior to *Cage* was that a jury must be properly instructed on the question of reasonable doubt. Following *Cage*, the principle was the same. No new fundamental principle emerged from *Cage*.

Nor did this Court's statements in *Sullivan v. Louisiana* effect a crucial turning point in our understanding of a bedrock principle of criminal procedure. This is best illustrated by the analysis *Sullivan* used to arrive at its holding: "It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated." *Sullivan*, 508 U.S. at 278. A rule that is based upon a "self-evident" principle hardly comports with *Teague's* requirement that a watershed rule alter our understanding of some bedrock principle.

In fact, the fairest reading of *Sullivan* is that it has not affected our understanding of what constitutes error in a reasonable doubt instruction at all. Rather, *Sullivan* only instructed "to which category the present error belongs." 508 U.S. at 279. A ruling assigning an error to one or another category does not invoke the historical significance of a bedrock principle implicit in ordered liberty. And even on the question of which category *Cage* error belongs to, *Sullivan* broke no significant new ground. As this Court observed, "Once the proper role of an appellate court engaged in the *Chapman*[*v. California*, 386 U.S. 18 (1967),] inquiry is understood, the illogic of harmless-error review in the present case becomes evident." *Sullivan*, 508 U.S. at 280. Again, an "evident" rule cannot fairly be said to affect a crucial change in our understanding of the law.

To the extent *Sullivan* "alters our understanding" of anything, it is of the proper ambit of the *Chapman* harmless error test. A review of this Court's analysis of the *Chapman* issue reveals that there, too, no new principle was articulated. Rather, this Court determined the question by reference to a well-settled principle: that a jury verdict is indispensable. *Sullivan*, 508 U.S. at 279-80, citing, inter alia, *Rose v. Clark*, 478 U.S. 570, 578 (1986). This Court's discussion of the ambit of *Chapman* in the *Sullivan* decision did not articulate a watershed rule of criminal procedure.

Similarly, the language used in *Sullivan* in discussing the *Fulminante* analysis reveals this Court was not altering the bedrock principles upon which trials are conducted. Again, Amici submit that a rule about the scope of harmless error review does not rise to the level of signifance necessary for a watershed rule of criminal procedure. Further, the *Fulminante* analysis is premised upon the "self-evident" principle that a jury that misunderstands the burden of proof cannot fairly be said to be a jury at all. *Sullivan*, 508 U.S. 278, 281. The Court concluded that such an error "is certainly" and "unquestionably" structural under pre-existing authority. 508 U.S. at 281-82. Once again, this Court's language reveals that it was relying on well-settled principles to arrive at its decision. Under such circumstances, the watershed rule exception is not available.[3/]

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3. The cases upon which Petitioner relies to support his conclusion that *Sullivan* and *Cage* announced a watershed rule are similarly flawed. *Nutter v. White*, 39 F.3d 1154, 1157 (11th Cir. 1994), and *Adams v. Aiken*, 41 F.3d 175, 178-79 (4th Cir. 1994), acknowledge the "alter our understanding" requirement in discussing the requirements for a watershed rule, but nowhere state how the requirement was fulfilled. Other cases discussing the issue have either simply accepted the holdings of these cases uncritically, or ignored the "alter our understanding" requirement all together. *E.g.*, *West v. Vaughn*, 204 F.3d 53, 59 (3d Cir. 2000); *Gaines v. Kelly*, 202 F.3d 598, 604-05 (2d Cir. 2000); *Morris v. Cain*, 186 F.3d 581, 585 (5th Cir. 1999); *In re Smith*, 142 F.3d 832, 835 (5th Cir. 1998)); *Humphrey v. Cain*, 120 F.3d 526, 529 (5th Cir. 1997); *Schneider v. Day*, 73 F.3d 610, 611 (5th Cir. 1996); *Harmon v. Marshall*, 69 F.3d 963, 967 (9th Cir. 1995); *Gaston v. Whitley*, 67 F.3d 121, 122 (5th Cir. 1995).

This Court has reserved the term "watershed" for rules that have somehow substantially changed our understanding of the principles fundamental to the integrity of our criminal justice system. This Court's repeated use of *Gideon* as the paradigm of a rule that fulfills not only the "accuracy" requirement, but also the "alter our understanding" requirement of the *Teague* watershed rule exception, demonstrates the centrality of the latter requirement to the analysis. Prior to *Gideon*, this Court had specifically held that indigent state court defendants did not have a constitutional right to appointed counsel in criminal cases. *Gideon*, 372 U.S. at 337-39, citing *Betts v. Brady*, 316 U.S. 455 (1942). Following *Gideon*, it became mandatory that every person facing trial for a serious crime be provided a lawyer. 372 U.S. at 344. This dramatic and fundamental shift in the Court's attitude toward a basic trial right, representing a clear break with the state of the law prior to the decision, altered our understanding of a bedrock principle.

Further, *Gideon* is instructive on the relative historical importance attached to pronouncements of new bedrock principles. *Gideon* represented a fundamental shift in this Court's view of the application of the Sixth Amendment to the States. The relatively prosaic holdings of *Cage* and *Sullivan* are simply not as significant to our understanding of basic liberty as was *Gideon*. *Cage* and *Sullivan* criticized a specific instruction, used in only a portion of the criminal trials in a single state. By contrast, *Gideon* imposed upon every state a requirement that attaches to every trial for a serious crime. The decisions in *Cage* and *Sullivan* do not enjoy the preeminent position in the pantheon of constitutional rights related to the conduct of criminal trials required before a rule can be considered watershed.

The language that this Court used to discuss the principles at issue in *Cage* and *Sullivan* fatally undermines Petitioner's

claim that those decisions, whether read separately or together, articulated a watershed rule of criminal procedure. Accordingly, application of the rule announced in those cases to Petitioner's claim would be barred under *Teague's* general prohibition on the retroactive application of new rules of criminal procedure to final cases on collateral review, even if it qualified as a second petition.

CONCLUSION

For the foregoing reasons, this Court's prior holding in *Sullivan*, that the error in giving an unconstitutional reasonable doubt instruction constitutes a structural defect, does not compel the conclusion that *Cage* articulated a watershed rule of criminal procedure, exempt from *Teague's* general prohibition on retroactive application of new rules to cases on collateral review. Accordingly, this Court should affirm the decision of the Fifth Circuit denying Petitioner relief.

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